Supreme Court, U.S.
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NO. -

IN THE

Supreme Court of the United States

CHRISTOPHER ARTUZ, Superintendent, Green Haven Correctional Facility,

Petitioner,

- against -

PABLO FERNANDEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT M. MORGENTHAU
District Attorney, New York County

MARK RYAN DWYER
MORRIE I. KLEINBART
NICOLE BEDER*
Assistant District Attorneys

New York County District
Attorney's Office
One Hogan Place
New York, New York 10013
(212) 335-9000

* *Counsel of Record for the Petitioner*

MAY 13, 2005

QUESTION PRESENTED

Whether state rules of procedure govern the date on which an application for state post-conviction review is deemed filed, when the pendency of that application is advanced as a toll for the one-year statute of limitations period contained in 28 U.S.C. section 2244(d)(1)?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Christopher Artuz, Superintendent of the Green Haven Correctional Facility, requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on March 17, 2005, affirming the judgment of the district court which denied Artuz's motion to dismiss the habeas petition as timebarred pursuant to 28 U.S.C. § 2244(d).

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 402 F.3d 111 (2d Cir. 2005). The decision is reprinted in the appendix of this petition at pp. 1a – 11a.

The order of the United States District Court for the Southern District of New York (Wood, J.), is reported at 175 F. Supp. 2d 682 (S.D.N.Y. 2001). It is reprinted in the appendix at pp. 12a – 21a.

The Magistrate's Report and Recommendation (Peck, M.J.), is reported at 2001 U.S. Dist. LEXIS 6188 (S.D.N.Y. May 15, 2001). It is reprinted in the appendix at pp. 22a – 36a.

The Appellate Division's order denying Fernandez's petition for a writ of error coram nobis is reported at 273 A.D.2d 950, 714 N.Y.S.2d 625 (1st Dept. 2000). The Order of the New York Court of Appeals denying respondent Fernandez's application for leave to appeal from the order of the Appellate Division, First Department is reported at 92 N.Y.2d 897, 680 N.Y.S.2d 60 (1998) (Kaye, C.J.). The decision of the Appellate Division, First Department

unanimously affirming the judgment of conviction is reported at 249 A.D.2d 3, 670 N.Y.S.2d 840 (1st Dept. 1998). That memorandum decision is reprinted in the appendix at pp. 37a – 43a.

JURISDICTION

This petition for a writ of habeas corpus was filed in the Southern District of New York invoking federal jurisdiction under 28 U.S.C. § 2254. Petitioner Artuz moved to dismiss the petition as untimely and the Magistrate Judge so recommended. On November 6, 2001, the District Court declined to adopt the Report and Recommendation of the Magistrate Judge and instead denied petitioner Artuz's motion to dismiss the petition as timebarred. That court certified for interlocutory review, pursuant to 28 U.S.C. § 1292(b), the dispositive question of the applicability of the mailbox rule to state filings urged as a toll of the limitations period. See 28 U.S.C. § 2244(d)(2).

On or about November 30, 2001, Artuz moved the Second Circuit for an order granting leave to take an interlocutory appeal from Judge Wood's order. On March 13, 2002, the Second Circuit entered an order staying Artuz's application pending the outcome of Carey v. Saffold, 536 U.S. 214, 122 S. Ct. 2134 (2002), in this Court. On August 29, 2003, the Second Circuit granted Artuz's request to appeal from Judge Wood's Order.

On March 17, 2005, the Second Circuit affirmed the District Court's denial of the motion to dismiss.

This petition for certiorari is filed within ninety days of the date of that order and is therefore timely. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2244(d) of Title 28 of the United States Code provides:

(1) A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in state custody pursuant to the judgment of the state court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court and made retroactively available to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Chapter 22, Section 600.2(a)(6) of the New York Codes, Rules and Regulations provides in pertinent part:

All papers filed may be filed either by personal delivery or by ordinary mail. If filed by mail, they shall be considered filed only upon receipt; and the envelope must be marked "Motion Papers." If an acknowledgment of receipt of the papers is desired, there must be enclosed with the papers being filed by mail a self-addressed postage-prepaid postal card bearing the title of the cause, the nature of the motion, the date on which it is returnable, and a statement of the papers filed. Such postal card, when stamped and returned by mail, shall serve as a receipt for the papers listed thereon.

STATEMENT OF THE CASE

The Trial Court Proceedings

In May, 1993, Jose Luis Marte, the head of a drug gang in the Manhattan Valley neighborhood of New York County, hired respondent Fernandez to kill Ramon Quintero. Quintero had threatened Marte after the latter had killed an acquaintance of Quintero's. On June 10, 1993, Fernandez shot Quintero to death in the presence of four eyewitnesses, including relatives and neighbors of Quintero. It was not until early 1995, when some of Marte's confederates began to cooperate with investigations into the drug trade in Manhattan Valley, that the eyewitnesses to the murder spoke to the authorities. Fernandez was arrested, charged, and was ultimately convicted, after trial, of Murder in the Second Degree.

After trial, the trial prosecutor discovered that a tangential trial witness, Police Officer Albert Melino, had sold cocaine to undercover New York State Troopers, four years before trial and a few months before being appointed a police officer. Defense counsel was apprised and Fernandez moved to set aside the jury's verdict on the grounds that the prosecution knew or should have known, and divulged to the

defense that, at the time of the trial, the officer was under investigation for the narcotics sale. Following a hearing, the motion was denied. Subsequently, the trial judge sentenced Fernandez to an indeterminate prison term of from twenty-five years to life.

The Proceedings in the Appellate Division

On direct appeal to the Appellate Division, First Department, Fernandez contended that the trial court should have granted a new trial because of the failure to disclose Officer Melino's criminal activity. Fernandez also claimed that the trial court erroneously admitted co-conspirator statements; that the exchanges between the court and the defense attorney were prejudicial; that the prosecutor improperly cross-examined a defense witness; that the People's summation was prejudicial; and that the court's reasonable doubt charge improperly shifted the burden of proof. In October of 1997, the People filed a brief addressing Fernandez's arguments.

On April 8, 1998, in a unanimous decision, the Appellate Division, First Department, affirmed the judgment of conviction in a five-page memorandum decision. 249 A.D.2d 3, 670 N.Y.S.2d 840 (1st Dept. 1998). Leave to appeal to the New York Court of Appeals was denied on August 18, 1998. 92 N.Y.2d 897, 680 N.Y.S.2d 60 (1998) (Kaye, C.J.).

By application dated September 15, 1999 and filed by mail, Fernandez, incarcerated at Green Haven Correctional Facility, petitioned the Appellate Division, First Department, for a writ of error coram nobis, claiming that he had not received the effective assistance of appellate counsel. That application was received by that Court on September 27, 1999. In an Order dated June 15, 2000, the Appellate

Division denied the application. People v. Fernandez, 273 A.D.2d 950, 714 N.Y.S.2d 625 (1st Dept. 2000).

The Proceedings in Federal District Court

By petition dated August 14, 2000, Fernandez sought a writ of habeas corpus from the United States District Court for the Southern District of New York. On behalf of Artuz, the State requested leave to file a pre-answer motion to dismiss the petition as time-barred under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), in particular 28 U.S.C. section 2244, as amended by the AEDPA. That request was granted and Artuz so moved.

Artuz argued that Fernandez's judgment became final on November 16, 1998, the end of the ninety day period within which Fernandez could have filed a petition for a writ of certiorari seeking Supreme Court review. Artuz observed that Fernandez had one year from that date – until November 16, 1999 – within which to file his petition, plus any time during which any properly filed post-judgment motions may have been pending. Fernandez had not filed until August 14, 2000, 272 days beyond the deadline.[1] Artuz acknowledged that Fernandez's state petition for a writ of error coram nobis, signed September 15, 1999, and received by the Appellate Division on September 27, 1999, tolled the limitations period during its pendency. He argued, however, that section 2244(d)(2)'s reference to a "properly filed" state application meant that state law governed the date of filing. He also noted that comity concerns required that state law be determinative. Hence, concluded Artuz, the coram nobis

[1] August 14, 2000, is the date petitioner signed his federal petition, and was assumed to be the date he handed it to prison officials for mailing. See Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379 (1988).

petition was deemed filed upon receipt by the court (22 N.Y.C.R.R. 600.2[a][6]) on September 27, 1999, when the court received it. As a result, the pendency of the motion tolled only the period from September 27, 1999 until June 15, 2000, the date the Appellate Division denied it, a total of 262 days.[2] The habeas corpus petition had been filed ten days past the expiration of the AEDPA's one-year limitation period and was untimely.

On May 15, 2001, Magistrate Judge Peck issued a Report and Recommendation in which he recommended that the petition be dismissed as time-barred. Specifically, Magistrate Judge Peck agreed that Fernandez's judgment became final on November 16, 1998, that Fernandez's coram nobis petition tolled the one-year limitations period, and that the date on which it was deemed filed was the date of Appellate Division receipt. He explicitly refused to apply the federal prison mailbox rule, see Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379 (1988). As a result, the state filing tolled insufficient time to render the habeas petition timely. Magistrate Judge Peck further recommended that Judge Wood grant a Certificate of Appealability on the applicability of the prisoner mailbox rule to state filings. On May 18, 2001, Artuz objected to the Report and Recommendation to

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[2] At the time Fernandez's coram nobis petition was denied, New York law did not provide for further appeal from the denial of a coram nobis petition in the Appellate Division. See Hizbullahankhamon v. Walker, 255 F.3d 65 (2d Cir. 2001), cert. denied, 536 U.S. 925, 122 S. Ct. 2593 (2002). The law has since been amended, and, effective November 1, 2002, appeals may be taken, by permission, from an order denying or granting a writ of error coram nobis. New York Criminal Procedure Law section 450.90(1).

the extent that it recommended granting a Certificate of Appealability even though Magistrate Judge Peck had not considered whether the petition stated a valid claim of the denial of a constitutional right.

On November 6, 2001, Judge Wood rejected the Report and Recommendation and denied the motion. In so ruling, Judge Wood rejected the argument that state procedural rules determine the date upon which a state motion to a state court is deemed file. Judge Wood held that the federal prison mailbox rule, as described in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379 controlled any question of when Fernandez's state coram nobis application was filed in state court. Fernandez v. Artuz, 175 F. Supp. 2d 682 (S.D.N.Y. 2001).

First, she observed that in the absence of congressional guidance for interpreting "properly filed" in 28 U.S.C. § 2244(d), the Circuit Courts of Appeals had "struggled to find a rationale for choosing between the federal prison mailbox rule and state procedural rules to determine the date of filing." Fernandez v. Artuz, 175 F. Supp. 2d at 684. Asserting that the Circuit Courts of Appeals were "split" on the issue, Judge Wood noted that the Houston v. Lack holding and the prison mailbox rule itself are both "solid features of AEDPA jurisprudence." Id. at 685 n.2.

Judge Wood then discussed the three bases that had been advanced for applying the state rule as opposed to the federal mailbox rule, and rejected each stated rationale in turn. First, Judge Wood rejected the notion that the term "properly filed" as used in the tolling provision of 28 U.S.C. § 2244(d)(2) meant "filed under state law." According to the judge, the term itself gave no indication of Congress's intention with respect to application of the prison mailbox

rule in determining the date of filing of a state post-judgment motion. In fact, Judge Wood wrote, it is "precisely because federal statutes are unclear as to how to determine whether a paper has been 'received' that the federal mailbox rule developed[.]" Id. (emphasis omitted). Thus, Judge Wood explained, "in the context of litigation initiated by pro se petitioners, the prison mailbox rule functions as a rule of construction to determine when a court paper was 'filed,' and is used regularly to calculate running and tolling of federal statutes of limitations found in statutes[.]" Id. at 685-86. Accordingly, it was properly applied to state filings urged as a basis for the 2244(d)(2) toll.

Second, Judge Wood rejected the notion that comity required that a state's own rules of filing be applied. According to Judge Wood, the respect for state courts' procedural rules "is [not] affected one way or another by the interpretation of the word 'filing'" in section 2244. Id. at 686. This is because state proceedings are "necessarily completed" by the time a state prisoner files a federal petition for habeas corpus relief. Thus, "the district court's determination of whether a state habeas petition was 'properly filed' in state court . . . does not, and cannot, affect the state court proceeding." Id. at 686. Instead, concluded Judge Wood, "the importance of uniformity, among all habeas filers, of the event constituting 'filing' for all federal tolling purposes," id., should control, given that similar uniformity was a regular feature of federal jurisprudence in the limitations context.

Finally, Judge Wood observed that the interests served by the mailbox rule would best be served by applying the rule to state filings – because "federal courts have shown particular concern for prisoners whose applications are delayed by factors they are helpless to control," see Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379.

On November 13, 2001, the state requested that Judge Wood certify an interlocutory appeal of her order pursuant to 28 U.S.C. section 1292(b). On November 19, 2001, Judge Wood agreed and issued an amended pinion and order certifying that an interlocutory appeal was warranted.

On or about November 30, 2001, Artuz moved the United States Court of Appeals for the Second Circuit for an order granting leave to take an interlocutory appeal from Judge Wood's order. On March 13, 2002, the Second Circuit entered an order staying Artuz's application pending the outcome of Carey v. Saffold, 536 U.S. 214, 122 S. Ct. 2134 (2001), in this Court.

On August 29, 2003, the Second Circuit issued an order granting Artuz's motion to appeal from Judge Wood's order.

The Second Circuit's Decision

On March 17, 2005, the Second Circuit affirmed Judge Wood's decision. Fernandez v. Artuz, 402 F.3d 111 (2d Cir. 2005). The Second Circuit acknowledged that the other circuit courts of appeals to consider the issue defer to the originating state's understanding of state filing laws, id. at 114-15, but found that because New York prescribes no filing deadlines for coram nobis petitions, the New York courts will never be called upon to decide whether the mailbox rule applies to them. Thus, the Second Circuit concluded, there is no real conflict between state law and federal law as to when a state motion is filed, and the mailbox rule should apply.

REASONS FOR GRANTING THE WRIT

The Second Circuit's decision superimposing the federal filing rule on state applications is inconsistent with the decision of every other circuit court of appeals that has ruled on the issue and is inconsistent with this Court's own view of "properly filed."

I. The Circuits are Now Split as to Whether the Convicting State's Rules of Procedure Determine When a Motion is Deemed Filed for Purposes of Calculating Section 2244(d)'s Limitations Period.

As is obvious from the preceding factual recitation, dispositive of the timeliness question here is the date upon which Fernandez's state motion was deemed filed. If it is deemed to have been filed when state practice deems the motion filed – upon receipt by the court – the petition is untimely. The Second Circuit, however, ignored the explicit state rule and extended Houston v. Lack's mailbox rule to the state filing, rendering the petition timely. In so holding, the Second Circuit announced a rule at odds with the rule endorsed by every other circuit court of appeals to consider this issue.

The date upon which a state motion is filed is significant in two contexts of habeas corpus practice. First, as in this case, the date of the filing of the state motion will determine precisely when tolling of the one year limitations period of 28 U.S.C. section 2244(d)(1) begins. See 28 U.S.C. § 2244(d)(2). Second, in those jurisdictions in which motions must be filed within a specified time period, the date of the filing will determine whether or not the claim raised in a post-judgment motion is procedurally barred. In both of these circumstances, each circuit court of appeals that has addressed this issue, save the Second Circuit in this case, has

held that there should be no impingement on state procedural rules concerning the date of filing.

For example, in the timeliness context, in Adams v. Lemaster, 223 F.3d 1177 (2000), the Tenth Circuit has rejected the notion that federal procedural law governs the date on which a state motion was filed for purposes of section 2244(d)(2). Instead, "[a]s a matter of federal law, we look to state law to determine when and whether a state petition was properly filed." Id. at 1182 n. 3. Finding no state law on point, the court attempted to predict what the New Mexico courts would do, id. at 1182. The court concluded that New Mexico would not apply the mailbox rule, but would consider the state motion filed on the date of its actual receipt in court.

Similarly, in Vroman v. Brigano, 346 F.3d 598 (6th Cir. 2003), the Sixth Circuit rejected the argument that the mailbox rule governs the date on which a state post-judgment motion was filed for purposes of section 2244(d)(2). The court noted that state law did not recognize the mailbox rule. As a general rule, the court reasoned, the federal courts "defer to a state's judgment on issues of state law and, more particularly, on issues of state procedural law" (Id. quoting, Israfil v. Russell, 276 F.3d 768 [6th Cir. 2001], cert. denied, 535 U.S. 1088 [2002]). It concluded that a state court's determination as to whether a motion had been timely filed governed whether the motion had been properly filed, and thus when it tolled the section 2244(d) limitations period. Id.

The Third Circuit, too, recognizes that state law governs. In Brown v. Shannon, 322 F.3d 768 (3d Cir.), cert. denied, 539 U.S. 948, 123 S. Ct. 2617 (2003), the Third Circuit considered whether a federal habeas petition was timely, and applied the federal mailbox rule to the state petitioner's state court filing. The Third Circuit applied the

rule, however, only after noting that the Pennsylvania state courts themselves apply the rule to prisoners' pro se filings. See Brown v. Shannon, 322 F.3d at 771, n.3; see also Luby v. Brady, 1996 U.S. Dist. LEXIS 8157, No. 95-26- SLR (D. Delaware 1996) (federal court will not apply mailbox rule to state filings where the state holds that papers not filed until received by court clerk).[3]

To be sure, in Anthony v. Cambra, 236 F.3d 568 (9th Cir. 2000), cert. denied, 533 U.S. 941, 121 S. Ct. 2576 (2001), and Saffold v. Newland, 224 F.3d 1087 (9th Cir. 2000),[4] the Ninth Circuit appeared to suggest that it was

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[3] While not explicitly stating that state rules of filing govern the date upon which state motions are deemed filed for purposes of 28 U.S.C. § 2244(d)(2), the Fifth Circuit did refuse to apply the Houston v. Lack mailbox rule to a Texas state filing. That court reasoned that to do so "would require [it] to interpret state rules of filing and to address the filing systems of state courts." Coleman v. Johnson, 184 F.3d 398, 402 (1999), cert. denied, 529 U.S. 1057, 120 S. Ct. 1564 (2000); see also Kestler v. Cockrell, 2003 U.S. App. LEXIS 17326 (5th Cir. 2003). Notably, Texas state courts do not apply the Houston v. Lack rule. See Kinnard v. Carnahan, 25 S.W.2d 266 (2000). For its part, the First Circuit has expressly declined to decide this issue, but has noted in one decision that to the extent it is a state issue, the originating state in question, Maine, has likewise reserved decision on whether to adopt the mailbox rule. See Donovan v. Maine, 276 F.3d 87, 91 n.3 (1st Cir. 2002), citing Finch v. State, 736 A.2d 1043 n.1 (Me. 1999).

[4] Saffold was amended at 250 F.3d 1262 (9th Cir. 2001), and was vacated and remanded by this Court as Carey v. Saffold, 536 U.S. 214, 122 S. Ct. 2134. The opinion in Carey, however, did not address the question presented here.

constitutionally required to apply the Houston v. Lack mailbox rule to state filings for statute of imitations purposes. See Anthony v. Cambra, 236 F.3d at 575; Saffold v. Newland, 224 F.3d at 1091. But the petitions at issue in both of these cases were grounded in California judgments of conviction. And the California state courts apply the Houston mailbox rule as a matter of state law. See In Re Jordan, 840 P.2d 983 (1992). And while neither Anthony v. Cambra nor Saffold v. Newland state so explicitly, this is presumably the basis for Ninth Circuit's reliance on the federal mailbox rule in those cases.[5]

The identical conclusion has been reached by those circuit courts of appeals that have addressed the "properly filed" question in the procedural forfeiture context. For example, in Davies v. McCaughtry, 2000 U.S. App. LEXIS 7257 (7th Cir. April 14), cert. denied, 531 U.S. 962, 121 S. Ct. 392 (2000), the petitioner's petition for review in the Wisconsin Supreme Court was received three days after the filing deadline, and that court dismissed the petition as untimely.[6] On federal habeas review, the petitioner argued that under Houston v. Lack, the petition was timely because he had placed the petition in the prison mail system two days before the filing deadline. The Seventh Circuit rejected application of the Houston v. Lack rule to the state filing, and affirmed the District Court's finding that the petitioner had procedurally defaulted his claims by failing to present them to the state's highest court. Id. at *3-5.

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[5] In any event, even if the Ninth Circuit case could be read to support the Second Circuit's position, that support only underscores the split among the Circuits.

[6] Davies v. McCaughtry is an unpublished decision from the Seventh Circuit. The rules of that Court, however, apparently permit reference to the case outside the Circuit.

Similarly, in Maples v. Stegall, 340 F.3d 433 (6th Cir. 2003), the petitioner delivered his application for leave to appeal to the state Supreme Court to the prison mailroom some 53 or 54 days after the intermediate appellate court had denied his application. The application to appeal was received in court 57 days after the intermediate appellate court's decision, thus rendering it untimely under Michigan law, which requires that such an application be filed no more than 56 days after the intermediate appellate court's decision. Michigan's high court returned the application without filing it due to the procedural default. Maples v. Stegall, 340 F.3d at 435.

While observing that Houston v. Lack's prison mailbox rule is not binding on the state of Michigan, the Sixth Circuit found that the prison officials' inaction, which resulted in the application for leave to appeal being late, constituted cause to excuse the procedural default. Thus, the circuit court followed state procedural rules in finding that the petitioner's application was procedurally defaulted, id., though it went on to find cause for the procedural default and prejudice therefrom.

Finally, in Koerner v. Grigas, in the procedural forfeiture context arising from an untimely state filing, the Ninth Circuit rejected the argument that the federal mailbox rule would override the state's finding of untimeliness inasmuch as the convicting state's law deem papers filed only upon receipt. Koerner v. Grigas, 328 F.3d 1039, 1044 n.1 (9th Cir. 2003); see also Insyxiengman v. Morgan, 2005 U.S. App. LEXIS 5067 (9th Cir. 2005) (in deciding if a state timebar rule constitutes an adequate and independent state ground, Ninth Circuit examines state law to see if Washington accepts or rejects prison mailbox rule).

In short, only the Second Circuit has held that the mailbox rule must be applied to state filings urged as a toll of the one-year limitations period. This is inconsistent with the plain language of Artuz v. Bennett. Indeed, in construing 28 U.S.C. section 2244(d)(2) in that case, this Court made clear that a "properly filed application" is one which is filed consistent with the requirements of state law. Specifically,

> An application is "filed," as that term is commonly understood, when it is delivered to, and accepted by, the appropriate court officer for placement into the official record. . . . And an application is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee.

Artuz v. Bennett, 531 U.S. 4, 8, 121 S. Ct. 361, 363-64 (2000) (citations omitted).

More recently, in clarifying Artuz, this Court distinguished between "filing conditions" including state time limits on the filing of post-judgment motions and "rule of decision" procedural bars. The Court explained that the former goes "to the very initiation of a petition and a court's ability to consider that petition." Pace v. DiGuglielmo, __

U.S.__, 2005 U.S. LEXIS 3705, *17 (April 27, 2005). This explanation emphasizes precisely what the Second Circuit ignored: that a properly filed petition is one which a state court recognizes as ready for consideration. If a state does not recognize a petition as ripe for its consideration – whether it is untimely or has not yet been received – it is not yet properly filed and does not yet qualify as a toll under section 2244(d)(2). Indeed, the Tenth Circuit has so understood Artuz even prior to the Pace gloss. The Second Circuit's conclusion, however, ignores the properly filed requirement. It reasoned that the date of filing question was not at issue in Artuz. Fernandez v. Artuz, 402 F.3d 111. But there is no suggestion in Artuz that the definition of "filed" relied upon by the Artuz court differs depending on the nature of the issue for which the word is being construed. After all, this Court relied upon the common meaning of the term "filed," a meaning that remains consistent regardless of its context.

Indeed, the Second Circuit had no sound basis for holding that the same language in the same subsection of the same statute has two different meanings. As this Court noted in Barnhart v. Walton, 535 U.S. 212, 122 S. Ct. 1265 (2002), a litigant in such circumstances should "explain why [the Court] should interpret the same statutory words differently in closely related contexts." Id. at 221; see also Wisconsin Department of Revenue v. William Wrigley, Jr. Company, 505 U.S. 214, 225 (1992). Two more closely related contexts could hardly be imagined than in this case. Indeed, they are inextricably intertwined. Thus, the language of the statute requiring a properly filed application should be given a consistent meaning, and should be interpreted in accordance with state rules governing filing.

II. The Second Circuit's Rule will have an Unfair and Confusing Effect With Respect to the Filing of Various Motions in the New York State Appellate Courts.

In rejecting Artuz's argument that state rules govern, the Second Circuit observed that, as far as the state filing at issue in this case was concerned, adoption of the Houston v. Lack mailbox rule would have no impact. The court's theory was that New York has no deadline for coram nobis petitions, and thus the state courts will never have to decide if the prison mailbox rule should apply to such motions. In the absence of such impact, the federal mailbox rule should apply when determining "when a state petition is 'properly filed' for purposes of tolling the AEDPA statute of limitations." Fernandez v. Artuz, 402 F.3d at 115. But the Second Circuit held that the federal mailbox rule applied to determine when "state petition[s]" are properly filed, and thus the court's rule will apply not only to motions without deadlines, but also to filings for which statutory deadlines.

Application of the federal mailbox rule to state motions with filing deadlines thus also divides the Tenth from the Second Circuit. In Adams v. Lemaster, the Tenth Circuit acknowledged that there was no deadline for the filing of the particular state motion urged as a toll in the case before it. Nevertheless, wrote the court, applying the mailbox rule,

> could lead to an obvious absurdity in the many states with filing deadlines for state petitions – a state court determination that a state petition was untimely, and the federal courts tolling the federal statute of limitations

> for the same petition because it was "properly filed." This approach contravenes common sense, the clear language of the statute, and our precedent.

Adams v. Lemaster, 223 F.3d at 1181; see Burger v. Scott, 317 F.3d 1133, 1135 (10th Cir. 2003); see also Garcia v. Shanks, 2003 U.S. App. LEXIS 24759 (10th Cir. Dec. 9, 2003); Truelove v. Smith, 2001 U.S. App. LEXIS 8822 (10th Cir. May 9, 2001).

This absurdity is evidenced even in the New York scheme which application of the mailbox rule purports to replace. The state filing rule that the Second Circuit's opinion overrode applies to all motions made in the Appellate Division, whether those motions must be made within a specific time or not. In New York, for example, although a petition for a writ of error coram nobis may be filed at any time, motions for leave to appeal from the denial of a collateral attack on the judgment of conviction made pursuant to New York Criminal Procedure Law section 440.10 must be made within 30 days after service of the order upon the defendant. New York Criminal Procedure Law § 460.10(4)(a); see Wedra v. LeFevre, 988 F.2d 334, 339 (2d Cir. 1993). Thus, under the Second Circuit's analysis, if such a motion is made to the Appellate Division in an untimely fashion and is denied, the post-judgment application will be deemed properly filed for section 2244(d)(2) purposes even though it is untimely under state law. Thus, the Second Circuit's decision creates chaos in what should be a straightforward analysis, and undermines the orderly administration of procedural default rules.

* * *

In sum, this Court should grant certiorari to end the split among the circuits and to clarify the confusion that will be created by the Second Circuit's rule.

CONCLUSION

For the aforementioned reasons, petitioner Christopher Artuz respectfully requests this Court to grant this petition for a writ of certiorari to review the judgment of the Second Circuit affirming the denial of Artuz's motion to dismiss.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney, New York County

MARK RYAN DWYER
MORRIE I. KLEINBART
NICOLE BEDER*
Assistant District Attorneys

New York County District Attorney's Office
1 Hogan Place
New York, New York 10013
(212) 335-3489

*Counsel of Record for the Petitioner

May 13, 2005

(2)

Supreme Court, U.S.
FILED

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NO. -

IN THE

Supreme Court of the United States

**CHRISTOPHER ARTUZ, Superintendent,
Green Haven Correctional Facility,**

Petitioner,

- against -

PABLO FERNANDEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. MORGENTHAU
District Attorney, New York County

MARK RYAN DWYER
MORRIE I. KLEINBART
NICOLE BEDER*
Assistant District Attorneys

New York County District
Attorney's Office
One Hogan Place
New York, New York 10013
(212) 335-9000

* *Counsel of Record for the Petitioner*

MAY 13, 2005

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PABLO FERNANDEZ, Petitioner-Appellee, -against- CHRISTOPHER ARTUZ, Superintendent, Green Haven, Respondent-Appellant.	03-2541

October 20, 2004 Argued
March 17, 2005 Decided

COUNSEL: MORRIE I. KLEINBART, Assistant District Attorney, New York County, (Robert M. Morgenthau, District Attorney, Nicole Beder, Assistant District Attorney, on the brief) New York, NY, for Respondent-Appellant.

ANDREW GOLDSTEIN, (Brett Dignam, on the brief) The Jerome N. Frank Legal Services Organization, New Haven, CT, for Petitioner-Appellee.

Before: JACOBS, SOTOMAYOR, HALL, Circuit Judges.
DENNIS JACOBS, Circuit Judge:

Pablo Fernandez seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his state court conviction.

Christopher Artuz, the Superintendent of Green Haven Correctional Facility, where Fernandez was incarcerated at the relevant time, moved to dismiss Fernandez's petition as time-barred in light of the one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act ("AEDPA"). See 28 U.S.C. § 2244(d). The United States District Court for the Southern District of New York (Wood, J.) denied Artuz's motion to dismiss. Fernandez v. Artuz, 175 F. Supp. 2d 682, 687 (S.D.N.Y. 2001).

The timeliness of a habeas petition is a question of law that we review de novo. Cf. Pratt v. Greiner, 306 F.3d 1190, 1195 (2d Cir. 2002) (citing Smaldone v. Senkowski, 273 F.3d 133, 136 (2d Cir. 2001)). The question turns on whether Fernandez's state coram nobis petition became "properly filed" within the meaning of 28 U.S.C. § 2244(d) when it was received by the Appellate Division of the New York State Supreme Court, or (on an earlier date) when it was delivered to prison officials for mailing. We conclude that the prison mailbox rule applies and that Fernandez's federal habeas petition was therefore properly filed within the one-year statute of limitations period.

I

AEDPA requires that a state prisoner seeking federal habeas relief file his federal habeas petition within one year after his state judgment of conviction becomes "final." 28 U.S.C. § 2244 (d)(1). Excluded from the one-year limitations period is "the time during which a properly filed application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2). Generally, a judgment becomes final "by the conclusion of direct review or the expiration of the time for seeking such review." 28

U.S.C. § 2244(d)(1)(A); see also Williams v. Artuz, 237 F.3d 147, 151 (2d Cir. 2001).

Fernandez's conviction was unanimously affirmed by the Appellate Division, First Department, People v. Fernandez, 249 A.D.2d 3, 670 N.Y.S.2d 840, 843 (App. Div. 1998), and the New York Court of Appeals denied leave to appeal, People v. Fernandez, 92 N.Y.2d 897, 702 N.E.2d 845, 680 N.Y.S.2d 60 (N.Y. 1998). The conviction became final 90 days thereafter -- i.e., after the period in which a litigant can petition for a writ of certiorari from the United States Supreme Court -- which was November 16, 1998. Absent a "properly filed" state application for collateral review, the AEDPA one-year statute of limitations was set to expire on November 16, 1999. See Fernandez v. Artuz, 2001 U.S. Dist. LEXIS 6188, 00-CV-7601(KMW)(AJP), 2001 WL 506889, at *3 (S.D.N.Y. May 15, 2001). Fernandez's federal habeas petition was dated August 14, 2000. Two hundred seventy-two days of tolling was therefore required to withstand the statute of limitations. Fernandez filed a coram nobis petition, which was denied by the First Department on June 15, 2000. So if the coram nobis petition was filed on or before September 17, 1999 (272 days before denial), Fernandez's federal habeas petition withstands the statute of limitations; otherwise, it does not.

On September 15, 1999, Fernandez delivered the coram nobis petition to prison authorities for them to mail. The coram nobis petition was not received by the First Department until September 27 or 28, 1999. The delay in transit was caused in part by the prison's mistaken belief that Fernandez's prison account had

insufficient funds to cover postage.[1] Fernandez, 175 F. Supp. 2d at 683.

Fernandez's federal habeas petition, dated August 14, 2000, was received in the pro se office of the Southern District of New York on August 16, 2000. The State moved to dismiss the petition as untimely pursuant to AEDPA's one-year limitations period. Magistrate Judge Peck recommended that the State's motion be granted. See Fernandez, 2001 U.S. Dist. LEXIS 6188, 2001 WL 506889. District Judge Wood rejected the recommendation, denied the State's motion to dismiss, and certified her Opinion and Order (pursuant to 28 U.S.C. § 1292(b)) upon a finding that the otherwise unappealable Order "involved a controlling question of law as to which there is substantial ground for difference of opinion" and "that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Fernandez, 175 F. Supp. 2d at 687 (quoting 28 U.S.C. § 1292(b))(internal quotation marks omitted). This Court granted Artuz leave to appeal.

II

The Supreme Court established what has become known as the prison mailbox rule in Houston v. Lack, 487 U.S. 266, 270, 101 L. Ed. 2d 245, 108 S. Ct. 2379 (1988). Interpreting Federal Rules of Appellate Procedure 3(a) and 4(a)(1), the Court held that a pro se petitioner's notice of appeal should be deemed filed from the time a prisoner delivers it to prison authorities for forwarding to

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[1] Although the parties dispute whether Fernandez's coram nobis petition was received on September 27 or September 28, 1999, that fact is immaterial to the timeliness of Fernandez's federal habeas petition.

the district court. Id. The Court stressed that pro se petitioners, unlike other litigants, are unable to "monitor the processing of their notices of appeal," are precluded from traveling directly to the courthouse to ensure timely filing, and must "entrust the forwarding of [their] notices of appeal to prison authorities whom [they] cannot control or supervise and who may have incentive to delay." Id. at 270-71. "No matter how far in advance the pro se prisoner delivers his notice to the prison authorities, he can never be sure that it will ultimately get stamped 'filed' on time." Id. at 271.

Many circuits, including this one, have applied the prison mailbox rule in a variety of contexts,[2] most notably to fix the date on which a federal habeas petition is filed. See, e.g., Adeline v.

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[2] As the district Court observed, the Second Circuit has consistently applied the mailbox rule to papers filed by state prisoners initiating federal actions. Fernandez, 175 F. Supp. 2d at 684 n. 1; see Tapia-Ortiz v. Doe, 171 F.3d 150, 152 n. 1 (2d Cir. 1999) (applying rule to filing of administrative claims under FTCA, but noting that the Houston principle does not apply when there is a "specific statutory regime to the contrary"); Dory v. Ryan, 999 F.2d 679, 682 (2d Cir. 1993) (applying rule to § 1983 complaints filed by state prisoners), modified on other grounds on reh'g, 25 F.3d 81 (2d Cir. 1994). Other Circuits have done the same. E.g., Longenette v. Krusing, 322 F.3d 758, 765 (3d Cir. 2003) (extending rule to prisoner contesting administrative proceedings initiated by the FBI); Casanova v. Dubois, 304 F.3d 75, 79 (1st Cir. 2002) (extending rule to state prisoner filing § 1983 complaint); Faile v. Upjohn Co., 988 F.2d 985, 988-89 (9th Cir. 1993) (extending rule to cover service of discovery responses); Garvey v. Vaughn, 993 F.2d 776, 783 (11th Cir. 1993) (extending rule to state and federal prisoners filing § 1983 complaints and FTCA claims). But see Guirguis v. INS, 993 F.2d 508, 510 (5th Cir. 1993) (declining to extend mailbox rule to filing appeals from the BIA, where the relevant Federal Rule of Appellate Procedure stated that "filing shall not be timely unless the papers are received by the clerk within the time fixed for filing").

Stinson, 206 F.3d 249, 251 n. 1 (2d Cir. 2000) (per curiam) ("When a prisoner is proceeding pro se, as petitioner then was, federal courts generally consider his or her petition for habeas corpus to have been filed as of the date it was given to prison officials for forwarding to the court clerk."); see also Nichols v. Bowersox, 172 F.3d 1068, 1077 (8th Cir. 1999) (extending Houston to federal habeas petition filings, where the relevant language of Rule 3 Governing Habeas Proceedings in United States District Courts Under § 2254 specifically related to receipt: "the clerk of the district court 'shall file the petition' and enter it on the court's docket 'upon receipt of the petition and the filing fee'") (citation omitted); Jones v. Bertrand, 171 F.3d 499, 502 (7th Cir. 1999) (same); Hoggro v. Boone, 150 F.3d 1223, 1226 n. 4 (10th Cir. 1998); Spotville v. Cain, 149 F.3d 374, 378 (5th Cir. 1998); Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998).

The timeliness of Fernandez's habeas petition depends upon when his state coram nobis petition was "properly filed" pursuant to AEDPA's tolling provision. 28 U.S.C. § 2244(d)(2). If Fernandez's state coram nobis petition was "properly filed" on the date he delivered it to prison authorities for mailing (September 15, 1999), his present federal habeas petition was timely filed. If it was not "properly filed" until it was received by the state court on September 27 or 28, 1999, his federal petition was ten or eleven days late.

"Neither AEDPA nor its legislative history explains which state filings qualify as properly filed applications." Villegas v. Johnson, 184 F.3d 467, 470 (5th Cir. 1999)(citing S. Rep. No. 104-179 (1995)). Absent Congressional guidance, courts either have applied the prison mailbox rule, or they have interpreted "properly

filed" as synonymous with "filed under state law" and then looked to state law.

The Ninth Circuit applies the prison mailbox rule to determine when a state petition is "properly filed" for AEDPA tolling purposes: "we [have] squarely held that the mailbox rule applies with equal force to the filing of state as well as federal petitions, because 'at both times, the conditions that led to the adoption of the mailbox rule are present; the prisoner is powerless and unable to control the time of delivery of documents to the court.'" Anthony v. Cambra, 236 F.3d 568, 575 (9th Cir. 2000) (citation omitted); see also Saffold v. Newland, 224 F.3d 1087, 1091 (9th Cir. 2000), amended by 250 F.3d 1262, 1268 (9th Cir. 2000), overruled on other grounds by Carey v. Saffold, 536 U.S. 214, 153 L. Ed. 2d 260, 122 S. Ct. 2134 (2002). But see Koerner v. Grigas, 328 F.3d 1039, 1043 n. 1 (9th Cir. 2003) ("Because Nevada does not recognize a prison mailbox rule for post-conviction petitions, Koerner's third petition was not filed under Nevada law until actually received by the clerk of court.") (internal citation and quotation marks omitted).

Other circuits, however, defer to the state court's application of state filing laws. See, e.g., Adams v. LeMaster, 223 F.3d 1177, 1181-82 (10th Cir. 2000); Webster v. Moore, 199 F.3d 1256, 1258-59 (11th Cir. 2000); Coleman v. Johnson, 184 F.3d 398, 401-02 (5th Cir. 1999). Artuz urges us to follow these cases because New York (in other contexts) often rejects the prison mailbox rule announced in Houston v. Lack. See, e.g., Grant v. Senkowski, 95 N.Y.2d 605, 744 N.E.2d 132, 134, 721 N.Y.S.2d 597 (N.Y. 2001) (holding that Article 78 papers are "filed" under New York law when received by the court, not when the pro se

prisoner delivers them to prison officials for mailing). However, New York's rejection of the mailbox rule does not preclude its application by a federal court in tolling a federal statute of limitations.[3] Cf. Jones, 171 F.3d at 501 (reconciling mailbox rule's application to federal habeas petition filings despite Rule 3(b)'s clear language contemplating receipt, because "Rule 3(b) determines when a case is filed in the procedural sense for the purpose of being placed on the court's docket, and the mailbox rule governs when a case is filed in the substantive sense for statute of limitations purposes").

The Supreme Court considered a related issue in 2000: whether a state application was "properly filed" for purposes of tolling the AEDPA one-year statute of limitations notwithstanding

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[3] Application of the mailbox rule in these circumstances is consonant with AEDPA's goals of "furthering the principles of comity, finality, and federalism." Williams v. Taylor, 529 U.S. 420, 436, 146 L. Ed. 2d 435, 120 S. Ct. 1479 (2000). Application of the rule evinces no disrespect for the competence of state courts, their procedures, or the stability of state verdicts. As already noted, the mailbox rule's application solely for the purpose of calculating a federal statute of limitations has no bearing on New York's own coram nobis proceedings or the substance of its adjudication of a properly filed application under state law. The rule already applies to a broad variety of state prisoner filings in federal actions; so it does not implicate new burdens on the state prison system. As Judge Wood noted below, respect for state proceedings is built into AEDPA's scheme because state habeas proceedings must be completed before a state prisoner may file a federal habeas petition. See 28 U.S.C. § 2254(b)(1)(A). Applying the mailbox rule merely grants the full statute of limitations for pro se prisoners attempting to reach the courts.

that it contained claims procedurally barred under New York law.[4] Artuz v. Bennett, 531 U.S. 4, 8, 148 L. Ed. 2d 213, 121 S. Ct. 361 (2000). The Court emphasized that "the question whether an application has been 'properly filed' is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." Id. at 9. In announcing this distinction, the Court stated, in dicta, that:

> An application is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee.

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[4] In Bennett, petitioner's application from state post-conviction relief contained claims subject to two procedural bars under New York law:
a bar against raising an issue that had been "previously determined on the merits upon an appeal from the judgment," N.Y. Crim. Proc. Law. § 440.10(2)(a) (McKinney 1994), and a bar against raising a claim that was available on direct appeal but was not raised because of the defendant's "unjustifiable failure," § 440.10(2)(c). 531 U.S. at 7.

Id. at 8 (citations omitted). This approach would not determine the present appeal. True, the local rules of New York State courts specify that a motion "shall be considered filed only upon receipt." 22 N.Y.C.R.R. § 600.2(a)(6). However, there is no deadline at all for filing coram nobis petitions. See People v. Langfelt, 21 A.D.2d 267, 249 N.Y.S.2d 949 (App. Div. 1964) (requiring lower court to conduct a hearing on petitioner's coram nobis petition filed more than two years following petitioner's release from prison); see also People v. Richetti, 302 N.Y. 290, 97 N.E.2d 908, 912 (N.Y. 1951). Regardless of when the New York court "considers" a coram nobis petition to be filed, the date of filing does not render it proper or improper.

Moreover, because New York State prescribes no deadline for coram nobis petitions, New York State courts will never have occasion to decide whether the prison mailbox should apply to them. Without a time limitation, a prisoner's state coram nobis petition will always be timely regardless of when it is delivered to prison authorities or received by the court. There is no and can be no real conflict between state law and federal law where there is no state deadline for filing the petition that tolls the AEDPA limitations period. We therefore apply the federal mailbox rule to ascertain when a state petition is "properly filed" for purposes of tolling the AEDPA statute of limitations.

To toll the AEDPA statute of limitations, the state petition must be both "properly filed" and "pending" during the tolling period. Artuz argues that application of the prison mailbox rule would read the word "pending" out of 28 U.S.C. § 2244(d)(2) because a coram nobis petition that has been timely delivered to the prison is not (also) "pending" until it is received at court. Our

reading of AEDPA gives effect to both terms. In Carey v. Saffold, the Supreme Court defined "pending" to mean: "through a period of continuance . . . of" or "until the . . . completion of"; "in other words, until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains pending." 536 U.S. 214, 219-20, 153 L. Ed. 2d 260, 122 S. Ct. 2134 (2002) (internal quotation marks and citation omitted). Thus the term "properly filed" fixes the date that starts the tolling of the AEDPA statute of limitations, and the term "pending" marks the end point, when the state court ultimately decides the prisoner's case. See id. at 219-220 (holding that the "pending" period includes the time between a lower state court's decision and petitioner's filing of a notice of appeal to a higher state court).

CONCLUSION

For the foregoing reasons, we affirm the order of the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PABLO FERNANDEZ,

Petitioner,

-against-

CHRISTOPHER ARTUZ, Superintendent, Green Haven Correctional Facility,

Respondent.

PABLO FERNANDEZ, petitioner, Pro se, Stormville, NY.

For CHRISTOPHER ARTUZ, respondent: Nicole Beder, Robert M. Morgenthau, District Attorney, New York County, New York, NY.

AMENDED ORDER AND OPINION

WOOD, U.S.D.J.:

Pro se petitioner seeks a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging his state court conviction for second degree murder. Respondents filed a motion to dismiss the petition as untimely. In a Report and Recommendation ("Report") dated May 15, 2001, Magistrate Judge Andrew J. Peck recommended that the Court deem the petition time-barred and grant the motion to dismiss. Both petitioner and respondents have filed objections

to the Report. For the reasons set forth below, the Court denies the motion to dismiss.

I. Discussion

The timeliness of this federal habeas petition depends upon when a state habeas petition is deemed "properly filed" under the tolling provisions of 28 U.S.C. § 2244(d)(2). As explained in the Report, familiarity with which is assumed, petitioner handed a state habeas petition to prison officials for mailing on September 15, 1999. See Report at 2-3. The petition was not received by the state court until September 27, 1999, due to both a delay in mailing that resulted from the prison officials' mistaken belief that petitioner lacked the money to cover postage, and the normal delay entailed in sending mail from the prison to the state court. See Report at 3; Petitioner's Affidavit, dated May 11, 2001. The present petition is timely if the state habeas petition is deemed properly filed on September 15, 1999, the date on which petitioner handed his state petition to the prison officials. The present petition is ten days too late if the state habeas petition is deemed filed on September 27, 2001, the date on which the state court received the petition. See Report at 6-7.

The Antiterrorism and Effective Death Penalty Act (AEDPA) established a one-year statute of limitations for habeas corpus petitions filed after April 24, 1996. See 28 U.S.C. § 2244(d)(1)-(2). The limitations period runs from the date on which the underlying criminal judgment becomes final by the conclusion of direct review, excluding time during which any "properly filed" application for state collateral review is pending. See Smith v. McGinnis, 208 F.3d 13, 17 (2d Cir. 2000). The timeliness of the present petition depends upon the proper calculation of the amount of time that should be tolled. Under federal procedural law, a federal habeas petition is deemed "properly filed" when the

prisoner delivers the petition to a prison official for mailing. See Noble v. Kelly, 246 F.3d 93, 97-98 (2d Cir. 2001). Were this rule, known as the prison mailbox rule, to govern the determination of when the state petition was "properly filed," the present petition would be timely. Were New York state procedural law to govern, the petition would be untimely because New York law does not deem an application filed until it is received by the state court. See Grant v. Senkowski, 95 N.Y.2d 605, 608-09, 721 N.Y.S.2d 597, 599, 744 N.E.2d 132 (2001).

In an unreported opinion, the Second Circuit used the prison mailbox rule to calculate the tolling of the one-year grace period provided in § 2254(d)(2)--the statute of limitations available to those prisoners convicted before AEDPA's enactment. See Milbank v. Senkowski, 2000 U.S. App. LEXIS 24852, No. 98-2958, 2000 WL 1459030, *2 (2d Cir. Sept. 29, 2000) (district court erred when it failed to toll AEDPA's one-year grace period starting at date state prisoner handed state habeas petition to prison official). Pursuant to the rules of this Circuit, an unreported opinion does not constitute binding authority. See 2d Cir. R., § 0.23 (2001). However, for the reasons discussed below, including this Circuit's consistent application of the mailbox rule to various filings by state prisoners,[1] and Milbank's indication of the direction of the Circuit on the instant issue, the Court applies the prison

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[1] The Second Circuit has consistently applied the federal prison mailbox rule to papers filed by state prisoners initiating other federal actions. See Nobel, 246 F.3d at 97 (applying the prison mailbox rule to federal habeas petition filed by state prisoner); Nelson v. Walker, 121 F.3d 828, 832 n. 2 (2d Cir. 1997) (date of delivery of notice of appeal to state prison officials is the relevant date for purposes of determining whether it was filed before the enactment of AEDPA); Dory v. Ryan, 999 F.2d 679, 682 (2d Cir. 1993), modified on other grounds on reh'g, 25 F.3d 81 (1994) (applying the prison mailbox rule to Section 1983 complaints filed by state prisoners).

mailbox rule to petitioner's state court petition for purposes of tolling AEDPA's one-year statute of limitations.

In the absence of any congressional guidance for interpreting "properly filed," circuit courts have struggled to find a rationale for choosing between the federal prison mailbox rule and state procedural rules to determine the date of filing.[2] The Ninth Circuit, in choosing the federal rule, adopted the Supreme Court's reasoning in Houston v. Lack, 487 U.S. 266, 101 L. Ed. 2d 245, 108 S. Ct. 2379 (1988), in which the Court held that the prisoner mailbox rule applied to notices of appeal filed pursuant to federal appellate rules. The Supreme Court opted for the interpretation that favored the pro se prisoner (who is powerless to control the

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[2] The Circuits are split on this issue and the Supreme Court has not yet considered it. In November 2000 Justice Antonin Scalia, writing for the Court, considered the effect of various state procedural bars on section 2254 petitions and held that a petitioner's application can meet the "properly filed" requirement of § 2244(d)(2) even if the claims it sets forth are procedurally barred by state law. See Artuz v. Bennett, 531 U.S. 4, 121 S. Ct. 361, 364, 148 L. Ed. 2d 213 (2000) (emphasis added). The Court's rationale was that "in common usage, the question whether an application has been 'properly filed' is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." 121 S. Ct. at 364. This holding sheds no light on how the Court would address the prison mailbox issue presented here. However, in the context of distinguishing compliance with filing procedures from compliance with law governing the content of applications, the Court stated in dictum that state law would govern whether an application's "delivery and acceptance" are in compliance with "the applicable laws and rules," including state rules on when a filing has been delivered timely to the appropriate court officer to be placed in the record. Id. at 364. The Report in the instant case relied upon this language in deciding that petitioner's filing was untimely. However, this dictum in Bennett echos language from Justice Scalia's own dissent from the Court's adoption of the "prison mailbox rule" twelve years earlier in Houston v. Lack, 487 U.S. 266, 277, 101 L. Ed. 2d 245, 108 S. Ct. 2379 (1988), and does not necessarily reflect that the Court has rejected the rule for AEDPA's tolling purposes. The holding in Houston, and the prison mailbox rule itself, are solid features of AEDPA jurisprudence.

time of delivery of documents to the court). The Ninth Circuit reasoned that the same interpretation should be given to AEDPA's tolling provision because the same conditions that led to the adoption of the mailbox rule are present whether the application at issue was filed in federal court or in state court. See Saffold v. Newland, 250 F.3d 1262, 1268 (9th Cir. 2001); Anthony v. Cambra, 236 F.3d 568, 575 (9th Cir. 2000).[3]

In contrast, the Fifth, Tenth, and Eleventh Circuits have relied on one or another combinations of: (1) assertions that the "plain meaning" of the words "properly filed" is "filed under state law"; (2) reference to the importance of showing respect for and deference to state courts generally and the fact that AEDPA in particular reflects Congress' intent to defer to state courts in some respects; and (3) the fact that the opposite result could lead to the "absurdity" that an application deemed untimely by the state court could be deemed "properly filed" for federal tolling purposes. See Adams v. LeMaster, 223 F.3d 1177, 1181-82 (10th Cir. 2000); Webster v. Moore, 199 F.3d 1256, 1258-59 (11th Cir. 2000); Coleman v. Johnson, 184 F.3d 398, 401-02 (5th Cir. 1999). The Court considers these points in turn.

First, as a matter of statutory construction, the words "properly filed" do not, in and of themselves, have a "plain meaning" that gives any indication of whether Congress intended for the federal prison mailbox rule to apply in determining the date of filing a state application, for purposes of calculating the § 2244

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[3] The Eight Circuit employed similar reasoning in Nichols v. Bowersox, 172 F.3d 1068 (8th Cir. 1999), in which that court applied the mailbox rule to the filing of a state prisoner's federal habeas petition in federal district Court. The Nichols panel observed that "the Supreme Court's reasoning in Houston v. Lack applies with virtually equal force to the issue" of whether the mailbox rule applies to federal habeas petitions filed by state prisoners. Id. at 1075.

filing period. For example, it is precisely because federal statutes are often unclear as to how to determine whether a paper has been "received" that the federal mailbox rule developed as a standard evidentiary presumption under the federal common law. See Anderson v. United States, 966 F.2d 487 (9th Cir. 1992) (applying the federal mailbox rule--that a postmark showing timely mailing of a document raises a rebuttable presumption that it was received--in determining that plaintiff's tax return was "received" by IRS); Schikore v. Bank America Supp. Ret. Plan, 269 F.3d 956, 2001 U.S. App. LEXIS 22384, 2001 WL 1222395 (9th Cir., 2001) (applying the federal mailbox rule as a rebuttable presumption in determining that insurer had "actually received" an ERISA form). In the context of litigation initiated by pro se petitioners, the prison mailbox rule functions as a rule of construction to determine when a court paper was "filed," and is used regularly to calculate running and tolling of federal statutes of limitations found in statutes governing direct appeals, Section 1983 actions, and Federal Tort Claims Act actions. See Garvey v. Vaughn, 993 F.2d 776 (11th Cir. 1993) (holding that the prison mailbox rule announced in Houston applies to pro se prisoners in state facility filing complaints under Section 1983 and under the Federal Tort Claims Act); Dory v. Ryan, 999 F.2d 679 (2d Cir. 1993), modified on other grounds on reh'g, 25 F.3d 81 (2d Cir. 1994) (applying the prison mailbox rule to Section 1983 complaints filed by state prisoners); Lewis v. Richmond City Police Dep't, 947 F.2d 733 (4th Cir. 1991) (same); Burrell v. Newsome, 883 F.2d 416 (5th Cir. 1989) (same). In these statutory schemes, as in AEDPA, the "plain language" of the relevant statutes is unhelpful in determining when court papers are considered "filed."

Second, respect for state courts is not affected one way or another by the interpretation of the word "filed" in a federal tolling provision; nothing in that interpretation affects the deference due to state courts (or state policies reflected in legislative enactments).

Under the federal habeas scheme, state habeas proceedings are necessarily completed by the time a state prisoner files a federal habeas petition. See 28 U.S.C. § 2254 (b)(1)(A) (requiring that habeas applicant "exhaust[] the remedies available in courts of the State"). The district court's determination of whether the state habeas petition was "properly filed" in state court for purposes of calculating tolling a federal statute of limitations does not, and cannot, affect the state court proceeding. The calculation of a federal statute of limitations bears on the federal court proceedings only.

Third, although some may see an advantage to having the date that a state application is deemed "filed" be the same for federal purposes as it is for state purposes, this advantage has little practical significance. Militating in the opposite direction, those concerned with symmetry could just as easily focus on uniformity, among all habeas filers, of the event constituting "filing" for all federal tolling purposes. Concern for uniformity of interpretation and application of federal statutes has led federal courts to use federal interpretative rules when applying federal statutes of limitations. See, e.g., Felder v. Casey, 487 U.S. 131, 138, 101 L. Ed. 2d 123, 108 S. Ct. 2302 (1988) (even where state statute of limitations applies to a federal cause of action, state court may not apply the related state law notice-of-claim provision). Uniform calculation of AEDPA's tolling provision as it applies to state filings would standardize the procedures that govern how inmates assert their federal rights, regardless of whether they are in federal or state prison, and regardless of their state of incarceration.

More important is the Supreme Court's recognition, eight years before AEDPA was enacted, of the interests of justice, including judicial economy, served by the mailbox rule. See Houston, 487 U.S. at 274-275. Although the Tenth Circuit found it "absurd" for an application that the state court deems untimely to

be deemed "properly filed" for federal tolling purposes, Adams, 223 F.3d at 1181 n.3, that "absurdity" diminishes when one takes into account the different concerns that underlie the rules adopted in some states and by federal courts. Federal courts have shown particular concern for prisoners whose applications are delayed by factors they are helpless to control -- a reality the Supreme Court recognized in Houston:

> The situation of [pro se] prisoners . . . is unique. Such prisoners cannot take the steps other litigants can take to monitor the processing of their notices of appeal to ensure that the court clerk receives and stamps their notices of appeal before [expiry of the deadline]. Unlike other litigants, pro se prisoners cannot personally travel to the courthouse to see that the notice is stamped "filed" or to establish the date on which the court received the notice.

Houston, 487 U.S. at 270-71. Additionally, using the prison mailbox rule to calculate tolling of AEDPA's statute of limitations simplifies and clarifies the process. As the Supreme Court explained in Houston:

> The pro se prisoner does not anonymously drop his notice of appeal in a public mailbox--he hands it over to prison authorities who have well-developed procedures for recording the date and time at which they receive papers for mailing and

> who can readily dispute a prisoner's assertion that he delivered the paper on a different date. . . . Making filing turn on the date the pro se prisoner delivers the notice to prison authorities is a bright-line rule, not an uncertain one. Relying on the date of receipt, by contrast, raises such difficult to resolve question as whether delays by the United States Postal Service constituted excusable neglect and whether a notice stamped "filed" on one day was actually received earlier.

Houston, 487 U.S. at 275. The prison mailbox rule lends the same administrative efficiency to ascertaining when a state petition was "properly filed" in state court for purposes of AEDPA tolling.

This Court adopts the interpretation that gives similarly situated petitioners the benefit of having the same event (a prisoner's handing an application to a prison official for mailing) commence the federal (AEDPA) tolling period. Use of the prison mailbox rule furthers both the federal interest in uniformity of application of federal law, and the interests cited by the Supreme Court when it adopted the prison mailbox rule. Moreover, an unreported opinion of this Circuit indicates that the prison mailbox rule applies to state filings when calculating tolling of AEDPA's statute of limitations. See Milbank, 2000 U.S. App. LEXIS 24852, (2d Cir. Sept. 29, 2000). For all these reasons, the Court determines that the federal mailbox rule applies to petitioner's filing of his state habeas petition for the purpose of the calculation of the tolling of time under § 2244(d)(2)

II. Conclusion

For the reasons set forth above, the Court deems the petition timely and denies respondent's motion to dismiss. Respondent must answer the petition or otherwise move by December 10, 2001.

28 U.S.C § 1292(b) provides that "if the Court is of the opinion that an order that is otherwise not appealable" to the circuit court (1) "involves a controlling question of law as to which there is substantial ground for difference of opinion," and (2) "that an immediate appeal from the order may materially advance the ultimate termination of the litigation," the District Court judge "shall so state in writing in such order." 28 U.S.C. § 1292(b). This Opinion and Order satisfies these criteria, and thus an interlocutory appeal is warranted.

SO ORDERED

Dated: New York, New York
November 19, 2001

Kimba M. Wood
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PABLO FERNANDEZ, Petitioner, -against- CHRISTOPHER ARTUZ, Superintendent, Green Haven Correctional Facility, Respondent	00 Civ. 7601(KBM (AJP) REPORT AND RECOMMENDATION

PABLO FERNANDEZ, Pro se, Stormville, NY.

For CHRISTOPHER ARTUZ: Nicole Beder, Robert M. Morgenthau, District Attorney, New York County, New York, NY.

ANDREW J. PECK, United States Magistrate Judge:

TO THE HONORABLE KIMBA M. WOOD, United States District Judge :

Petitioner Pablo Fernandez, pro se, seeks a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, from his June 21, 1996 conviction after a jury trial in Supreme Court, New York County, of second degree murder and sentence of twenty-five years to life imprisonment. (Dkt. No. 2: Pet. PP 1-6.) See also People v. Fernandez, 249 A.D.2d 3, 3, 670 N.Y.S.2d 840, 842 (1st Dep't),

appeal denied, 92 N.Y.2d 897, 680 N.Y.S.2d 60, 702 N.E.2d 845 (1998).

Fernandez's petition raises seven habeas grounds: (1) the trial court's reasonable doubt jury charge shifted the burden [*2] of proof (Pet. P 12, Point I); (2) a Brady violation (id. Point II); (3) prosecutorial misconduct (id. Point III); (4) prejudicial comments by the trial judge (id. Point IV); (5) admission of hearsay (id. Point V); (6) denial of the right to present a defense (id. Point VI); and (7) ineffective assistance of appellate counsel in failing to include issues in the application for leave to appeal to the New York Court of Appeals (id. Point VII).

The State has moved to dismiss the petition as barred by the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). (See Dkt. Nos. 11, 13, 17.) For the reasons set forth below, the Court agrees that the petition is time barred and should be dismissed.

PROCEDURAL BACKGROUND

State Court Proceedings

On June 21, 1996, Fernandez was convicted of second degree murder and sentenced to twenty-five years to life imprisonment. (Dkt. No. 2: Pet. PP 1-4.) The First Department affirmed Fernandez's conviction on April 2, 1998. People v. Fernandez, 249 A.D.2d 3, 670 N.Y.S.2d 840 (1st Dep't 1998). The New York Court of Appeals denied leave to appeal on August 18, 1998. People v. Fernandez, 92 N.Y.2d 897, 680 N.Y.S.2d 60, 702 N.E.2d 845 (1998).

Fernandez filed a writ of error coram nobis in the First Department, which denied it on June 15, 2000. People v. Fernandez, 273 A.D.2d 950, 714 N.Y.S.2d 625 (1st Dep't 2000). (See also Dkt. No. 4: Fernandez 12/7/00 Aff. PP 1-4 & Ex.A.) The date when Fernandez "filed" the coram nobis petition is critical to the AEDPA time bar issue before the Court. According to Fernandez, he gave his coram nobis papers, which are dated September 15, 1999, to prison officials for mailing on September 15, 1999. (See Fernandez 12/7/00 Aff. P 3 ("I filed my coram nobis on September 15, 1999"); Dkt. No. 11: A.D.A. Nicole Beder 3/30/01 Aff. Ex. A: Fernandez Coram Nobis Aff. & Br., sworn to 9/15/99; Dkt. No. 16: Fernandez 5/3/01 Letter to Court at 2 ("on September 15, 1999, I actually delivered my coram nobis papers to my custodians and that I requested that my papers be forwarded to both the Appellate Division and respondent via certified mail, return receipt requested").

According to the State, the coram nobis papers bear a Green Haven Correctional Facility postage meter stamp dated September 24, 1999 (Dkt. No. 13: Beder 4/13/01 Supp. Aff. P 4 & Ex. C), and were stamped received by the D.A.'s office and First Department on September 27, 1999[1] (Dkt. No. 11: Beder 3/30/01 Aff. P 9; Dkt. No. 13: Beder 9/13/01 Supp. Aff. PP 3-5 & Ex. A; Dkt. No. 15: Fernandez 4/24/01 Reply Aff. PP 6-7 & Ex. 2.)

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[1] There is some dispute as to whether Fernandez's coram nobis papers were received on September 27 or 28, but that is immaterial to decision of the time bar issue.

Fernandez's Federal Habeas Petition and Federal Court Proceedings

Fernandez's federal habeas petition is dated August 14, 2000 and was received by the Court's pro se office on August 16, 2000. (Dkt. No. 2: Pet., 1st & last pages.)

By Order dated October 10, 2000, Chief Judge Mukasey ordered Fernandez to show cause why the petition was not barred by the AEDPA's one year limitation period. (Dkt. No. 3: 10/10/00 Order.) Fernandez responded on December 7, 2000, as follows:

2. As concluded by this Court, my judgment of conviction became final on November 18, 1998 at the conclusion of the ninety days during which I could have sought certiorari in the United States Supreme Court. Thus, November 18, 1999, was the last day for filing my habeas corpus petition.

3. However, the filing of my Writ of Errors Coram Nobis triggered the tolling provision. I filed my Coram Nobis on September 15, 1999, Sixty-five (65) days before the one-year statute of limitation period ran out, and it was denied on June 15, 2000.

4. . . . Since the one-year time limitation clock was re-activated the day after (June 15/2000) the Appellate Division denied the Coram Nobis, my last day for filing my habeas petition was moved to August 19, 2000 (a Saturday). Therefore, because I mailed my habeas petition on August 14, 2000, it was filed in accordance with the one-year statute of limitation period (please see this Court Clerk's Office letter, which I received on August 18/2000, acknowledging receipt of my habeas. . . .).

(Dkt. No. 4: Fernandez 12/7/00 Aff. PP 2-4, citations & quotations omitted.)

The case was referred to me on January 16, 2001 (Dkt. No. 7); on January 23, 2001, I ordered the State to respond to Fernandez's petition (Dkt. No. 8); and on April 4, 2001, the State moved to dismiss the Petition on statute of limitations grounds (Dkt. No. 11).

ANALYSIS

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act ("AEDPA"). The AEDPA instituted a one-year statute of limitations for habeas corpus petitions filed after April 24, 1996:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> . . .

> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1)-(2).

The AEDPA one-year limitations period started to run here on November 16, 1998, ninety days after the New York Court of Appeals denied Fernandez leave to appeal on August 18, 1998, when the time to file a petition for certiorari expired. Williams v. Artuz, 237 F.3d 147, 150-51 & n.1 (2d Cir. 2001); accord, e.g., Bonilla v. Ricks, 2001 U.S. Dist. LEXIS 2505, 00 Civ. 7925, 2001, WL 253605 at *2 (S.D.N.Y. Mar. 14, 2001) (Peck, M.J.); Shaw v. Mazzuca, 2001 U.S. Dist. LEXIS 612, 00 Civ. 6941, 2001 WL 66404 at *2 (S.D.N.Y. Jan. 26, 2001) (Peck, M.J.); 28 U.S.C. § 2244(d)(1)(A). Both the State and Fernandez agree that the AEDPA's one year limitation period began to run after the expiration of the ninety day certiorari period, i.e., on November 16, 1998. (Dkt. No. 11: State 3/30/ 01 Br. at 5; Dkt. No. 4: Fernandez 12/7/00 Aff. PP 2-3.)

The Second Circuit has held that the state collateral attack toll of § 2244(d)(2) does not start the one-year statute of limitations to run anew; such an interpretation would allow an inmate to avoid the effect of the AEDPA's one-year statute of limitations by bringing a belated state collateral attack. E.g., Smith v. McGinnis, 208 F.3d 13, 17 (2d Cir.), cert. denied, 531 U.S. 840,

148 L. Ed. 2d 63, 121 S. Ct. 104 (2000).[2] Rather, § 2244(d)(2), merely excludes the time a collateral attack is under submission from the calculation of the one-year statute of limitations." Torres v. Miller, 1999 U.S. Dist. LEXIS 13987, *11, 1999 WL 714349 at *4 (citing cases).[3] Fernandez concedes that his state collateral

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[2] See also, e.g., Steadman v. Senkowski, 2000 U.S. App. LEXIS 26908, *1-2; 234 F.3d 1263 (table), 2000 WL 1591268 at *1 (2d Cir. 2000) ("the tolling provision of 28 U.S.C. § 2244(d)(2) excludes time while a state relief application is pending but does not reset the date on which the limitations period begins"); Bonilla v. Ricks, 2001 U.S. Dist. LEXIS 2505, 2001 WL 253605 at *2; Shaw v. Mazzuca, 2001 U.S. Dist. LEXIS 612, 2001 WL 66404 at *2; Mercado v. Portuondo, 2000 U.S. Dist. LEXIS 16018, 99 Civ. 11234, 2000 WL 1663437 at *9 (S.D.N.Y. Nov. 3, 2000) (Peck, M.J.); Stokes v. Miller, 2000 U.S. Dist. LEXIS 8793, 00 Civ. 0806, 2000 WL 640697 at *2 (S.D.N.Y. May 18, 2000) (Peck, M.J.), report & rec. adopted by 2000 U.S. Dist. LEXIS 11300, 2000 WL 1121364 (S.D.N.Y. July 21, 2000) (Berman, D.J.); Foreman v. Garvin, 2000 U.S. Dist. LEXIS 8219, 99 Civ. 9078, 2000 WL 631397 at *6 (S.D.N.Y. May 16, 2000) (Peck, M.J.); Mojica v. David, 2000 U.S. Dist. LEXIS 8394, 99 Civ. 11990, 2000 WL 631385 at *2 (S.D.N.Y. May 16, 2000) (Peck, M.J.), report & rec. adopted by 2000 U.S. Dist. LEXIS 9964, 2000 WL 991391 (S.D.N.Y. July 19, 2000) (Cote, D.J.); Martinez v. Stinson, 2000 U.S. Dist. LEXIS 3696, 98 Civ. 7718, 2000 WL 284191 at *3 (S.D.N.Y. Mar. 9, 2000) (Sprizzo, D.J. & Peck, M.J.); Torres v. Miller, 1999 U.S. Dist. LEXIS 13960, 99 Civ. 0580, 1999 WL 714349 at *3 (S.D.N.Y. Aug. 27, 1999) (Mukasey, D.J. & Peck, M.J.); Lucidore v. New York State Div. of Parole, 1999 U.S. Dist. LEXIS 11788, 99 Civ. 2936, 1999 WL 566362 at *4 (S.D.N.Y. Aug. 3, 1999) (Peck, M.J.), aff'd, 209 F.3d 107 (2d Cir.), cert. denied, 121 S. Ct. 175 (2000); Varsos v. Portuondo, 1999 U.S. Dist. LEXIS 11578, 98 Civ. 6709, 1999 WL 558147 at *3 (S.D.N.Y. July 9, 1999) (Batts, D.J. & Peck, M.J.); DeVeaux v. Schriver, 1999 U.S. Dist. LEXIS 15653, 98 Civ. 7563, 1999 WL 1216298 at *4 (S.D.N.Y. Apr. 29, 1999) (Peck, M.J.), report & rec. adopted by 1999 U.S. Dist. LEXIS 18701, 1999 WL 1095580 (S.D.N.Y. Dec. 3, 1999) (Mukasey, D.J.). [*9]

[3] Accord, e.g., Smith v. McGinnis, 208 F.3d at 17; Bonilla v. Ricks, 2001 U.S. Dist. LEXIS 2505, 2001 WL 253605 at *2; Shaw v. Mazzuca, 2001 U.S. Dist. LEXIS 612, 2001 WL 66404 at *2; Mercado v. Portuondo, 2000 U.S.

attack (i.e., his coram nobis petition) tolled but did not start anew the AEDPA limitations period. (Dkt. No. 4: Fernandez 12/7/00 Aff. PP 3-4, quoted on page 3 above.)

As noted above, Fernandez's conviction became final and the AEDPA limitations period started on November 16, 1998. The AEDPA limitations period ran until tolled by Fernandez's coram nobis petition. If the coram nobis petition was "filed" on September 15, 1999, then 303 days ran (and 62 days remained). If the coram nobis petition was not "filed" until September 27, 1999, then 315 days ran (and 50 days remained).

It is undisputed that the First Department denied Fernandez's coram nobis petition on June 15, 2000, restarting the AEDPA limitations clock, and Fernandez's habeas petition is dated August 14, 2000, a passage of an additional 60 days.

Thus, if Fernandez's coram nobis petition to the First Department is deemed filed on September 15, 1999, Fernandez's federal habeas petition is timely, but if his coram nobis petition is not deemed filed until September 27, 1999, then Fernandez's federal habeas petition is ten days untimely. Decision of this issue turns on whether the "prison mailbox rule" applies to Fernandez's coram nobis petition.

Dist. LEXIS 16018, 2000 WL 1663437 at *9; Stokes v. Miller, 2000 U.S. Dist. LEXIS 8793, 2000 WL 640697 at *2; Foreman v. Garvin, 2000 U.S. Dist. LEXIS 8219, 2000 WL 631397 at *6; Mojica v. David, 2000 U.S. Dist. LEXIS 8394, 2000 WL 631385 at *2; Lucidore v. New York State Div. of Parole, 1999 U.S. Dist. LEXIS 11788, 99 Civ. 2936, 1999 WL 566362 at *4.

The federal "prisoner mailbox rule" has its genesis in Houston v. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988), where the Supreme Court interpreted the Federal Rules of Appellate Procedure and held that notice of appeal was timely when the pro se prisoner delivered his papers to prison authorities for mailing to the federal court. 487 U.S. at 270, 108 S. Ct. at 2382. While speaking eloquently about how a pro se prisoner has no choice but to hand his appeal papers to prison authorities for forwarding to the Court,[4] it is clear that the Supreme Court was

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[4] The Supreme Court stated:

> The situation of prisoners seeking to appeal without the aid of counsel is unique. Such prisoners cannot take the steps other litigants can take to monitor the processing of their notices of appeal and to ensure that the court clerk receives and stamps their notices of appeal before the 30-day deadline. Unlike other litigants, pro se prisoners cannot personally travel to the courthouse to see that the notice is stamped "filed" or to establish the date on which the court received the notice. Other litigants may choose to entrust their appeals to the vagaries of the mail and the clerk's process for stamping incoming papers, but only the pro se prisoner is forced to do so by his

construing federal statutes and rules and not announcing a rule of Constitutional dimension. See, e.g., Davies v. McCaughtry, 215 F.3d 1329 (table), 2000 WL 387147 at *1 (7th Cir. 2000) (rejecting argument that Houston's mailbox rule rests on due process grounds and therefore must be followed by states), cert. denied, 121 S. Ct. 392 (2000); Jenkins v. Burtzloff, 69 F.3d 460, 461 (10th Cir. 1995) ("The rationale of Houston was not constitutional or equitable in nature; rather, it was based on an interpretation of the word 'filed' in the rule and statute governing the timeliness of notices of appeal."); Nigro v. Sullivan, 40 F.3d 990, 995 & n.1 (9th Cir. 1994) (although Houston "rests on policy arguments and some notion of fairness," it contains no explicit reference to due process and the Court "cannot in the name of sympathy rewrite a clear procedural rule").

The Second Circuit has extended the Houston v. Lack prisoner mailbox rule to, inter alia, federal civil complaints and habeas corpus petitions in federal court. See, e.g., Noble v. Kelly, 246 F.3d 93, 97, 2001 U.S. App. LEXIS 6012, *9 (2d Cir. 2001) ("We conclude that the district court properly extended the prison mailbox rule to petitions for writs of habeas corpus.") (& citing

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> situation. . . . Worse, the pro se prisoner has no choice but to entrust the forwarding of his notice of appeal to prison authorities whom he cannot control or supervise and who may have every incentive to delay. Houston v. Lack, 487 U.S. at 270-71, 108 S. Ct. at 2382.

cases for other federal applications of the rule); Tapia-Ortiz v. Doe, 171 F.3d 150, 152 & n.1 (2d Cir. 1999) (extends prison mailbox rule to Federal Tort Claim Act administrative proceeding, but notes that "Houston does not apply, of course, when there is a specific statutory regime to the contrary"); Dory v. Ryan, 999 F.2d 679, 682 (2d Cir. 1993) (extends Houston rule to prisoner § 1983 complaint in federal court under the Federal Rules of Civil Procedure).[5]

The AEDPA's limitation period is tolled during the time in "which a properly filed application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. 2244(d)(2). Whether a state collateral attack is "properly filed" is a question of state, not federal, law. See Artuz v. Bennett, 531 U.S. 4, 121 S. Ct. 361, 363-64, 148 L. Ed. 2d 213 (2000) ("An application is 'filed,' as that term is commonly understood, when it is delivered to, and accepted by, the appropriate court officer for placement into the official record. And an application is 'properly filed' when its delivery and acceptance are in compliance with the applicable [state] laws and rules governing filings.") (citations omitted). Thus, the question is whether New York would apply the Houston v. Lack prisoner mailbox rule.

The First Department's rules state that a motion "shall be considered filed only upon receipt." 22 N.Y.C.R.R. § 600.2(a)(6). In the context of a similar rule under the CPLR for filing Article 78

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[5] See also, e.g., Yeung v. Artuz, 2000 U.S. Dist. LEXIS 916, 97 Civ. 3288, 2000 WL 145103 at *7 (S.D.N.Y. Feb. 3, 2000) (applying Houston rule to federal habeas petition, citing cases); Rhodes v. Senkowski, 82 F. Supp. 2d 160, 165 (S.D.N.Y. 2000) (Buchwald, D.J. & Peck, M.J.) (same).

papers, the New York Court of Appeals recently rejected the Houston v. Lack prisoner mailbox rule. Grant v. Senkowski, 95 N.Y.2d 605, 608-09, 721 N.Y.S.2d 597, 599, 744 N.E.2d 132 (2001). The New York Court of Appeals noted that the holding in Houston v. Lack "was based, in part, upon the [Supreme] Court's interpretation of the term 'filing' as used in the Federal Rules of Appellate Procedure" and held that the "Supreme Court's authority in interpreting its own rules exceeds [the New York Court of Appeals'] authority in interpreting the CPLR." Grant v. Senkowski, 95 N.Y.2d at 608, 721 N.Y.S.2d at 599. The New York Court of Appeals concluded:

> We recognize the greater impediments pro se prisoners may face over most other litigants in filing their legal papers on time. But, absent any evidence that the Legislature intended to vary for their benefit the filing-by-receipt requirement established in CPLR 304, we cannot depart from the statutorily mandated filing requirements by incorporating a pro se prisoner mailbox exception.

Grant v. Senkowski, 95 N.Y.2d at 609, 721 N.Y.S.2d at 599.

It appears, therefore, that the New York Court of Appeals would not apply the prisoner mailbox rule to the filing of a coram nobis petition in the Appellate Division, but would strictly construe

the rule that the papers are "considered filed only upon receipt" by the court.

Accordingly, Fernandez's coram nobis petition was not filed, under New York rules, until received by the First Department on September 27, 1999. Hence Fernandez's federal habeas petition is untimely. See, e.g., Adams v. LeMaster, 223 F.3d 1177, 1181 (10th Cir. 2000) ("the federal mailbox rule announced in Houston v. Lack does not apply to § 2244(d)(2) for purposes of determining when the tolling period for a properly-filed state petition begins... we too hold state law must determine when a state [collateral attack] is considered filed."), cert. denied, 149 L. Ed. 2d 113, 121 S. Ct. 1198 (2001); Coleman v. Johnson, 184 F.3d 398, 402 (5th Cir. 1999) ("We decline to extend the mailbox rule to the determination of filing dates for state habeas applications."), cert. denied, 529 U.S. 1057, 120 S. Ct. 1564, 146 L. Ed. 2d 467 (2000); but see Anthony v. Cambra, 236 F.3d 568, 575 (9th Cir. 2000) (applying Houston's mailbox rule to determine date on which state petition was filed for purposes of § 2244(d)(2) even though state had not applied the rule), cert. denied, 121 S. Ct. 2576, 150 L. Ed. 2d 739, 69 U.S.L.W. 3790 (2001). The result might seem harsh, but Congress gave prisoners one year to file a habeas petition, cognizant of the delays inherent in prison life. See, e.g., Brooks v. Olivarez, 1998 U.S. Dist. LEXIS 12239, *6, No. C 98-134, 1998 WL 474160 at *2 (N.D. Cal. Aug. 5, 1998) ("Congress gave prisoners one year to get to federal court after their convictions became final... That one year gives the prisoner plenty of time to get to federal court and leaves room for the inevitable delays in mail, unpredictable lockdowns, as well as interruptions in research and writing time common in prison."). While prison authorities may have caused a nine day delay, the balance of time was

attributable to Fernandez. There is always a risk in litigation, for pro se prisoners or even lawyers, that if one waits until the last minute, something might go wrong. The First Department's rules clearly hold that a motion is filed upon "receipt" by the Court. Accordingly, Fernandez's habeas petition is untimely.

CONCLUSION

For the reasons set forth above, Fernandez's federal habeas corpus petition should be dismissed as barred by the AEDPA's one year limitations period. Because neither the Second Circuit nor the New York Court of Appeals has addressed the applicability of the "prisoner mailbox rule" to the filing date of state collateral attacks on a conviction and the effect on the AEDPA's limitations period, I recommend that the Court issue a certificate of appealability. See Slack v. McDaniel, 529 U.S. 473, 120 S. Ct. 1595, 1599, 146 L. Ed. 2d 542 (2000) (certificate of appealability should issue where "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further"); Lucidore v. New York State Div. of Parole, 209 F.3d 107, 112 (2d Cir. 2000) (certificate of appealability should issue "if the issues involved in a petition are debatable among jurists of reason, could be resolved in a different manner, or are adequate to deserve encouragement to proceed further.").

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Kimba M. Wood, 500 Pearl Street, Room 1610, and to my chambers, 500 Pearl Street, Room 1370. Any requests for an extension of time for filing objections must be directed to Judge Wood. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993), cert. denied, 513 U.S. 822, 115 S. Ct. 86, 130 L. Ed. 2d 38 (1994); Roldan v. Racette, 984 F.2d 85, 89 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir.), cert. denied, 506 U.S. 1038, 113 S. Ct. 825, 121 L. Ed. 2d 696 (1992); Small v. Secretary of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

Dated: New York, New York
May 15, 2001

Respectfully submitted,
Andrew J. Peck
United States Magistrate Judge

SUPREME COURT OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

The People of the State of New York,

Petitioner,

-against-

Pablo Fernandez,

Appellant

For Respondent: Nancy Strohmeyer.
For Defendant-Appellant: David H. Weiss.

Judgment, Supreme Court, New York County (Leslie Crocker Snyder, J.), rendered June 21, 1996, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

Defendant was hired by Jose Luis Marte to shoot Ramon Quintero, with whom Marte had an ongoing dispute. Marte was the head of a drug-selling gang known as the Red Top Crew, of which defendant was a member. On June 10, 1993, a man with a ponytail got out of a car in front of 504 West 135th Street and fired multiple shots from an automatic weapon at the persons in front of the building. Quintero was killed and another man was injured. Four

eyewitnesses observed the shooting and identified defendant at trial as the shooter. Defendant admitted to two members of another drug gang that he had shot Quintero and "left him like a piece of shit on the floor."

On appeal, defendant contends that the trial court erred in denying his CPL 330.30 motion to set aside the verdict on the ground that the prosecution failed to disclose exculpatory Brady material (see, Brady v Maryland, 373 US 83). The alleged Brady material was the allegation that one of the police witnesses who testified at this defendant's trial, Police Officer Melino, had been under investigation for selling drugs in 1991 or 1992, a few months before he entered the police academy. In fact, Officer Melino was arrested based on these allegations two days after the jury convicted defendant in this case.

A hearing was held on defendant's motion, at which Assistant District Attorney (ADA) William Burmeister of the District Attorney's Office Official Corruption Unit testified. The hearing evidence disclosed that on January 16, 1996, New York State Troopers in the White Plains office notified members of the New York City Police Department's (NYPD) Liaison Unit that Officer Melino had been under investigation for selling drugs in 1991 or 1992.[1] Two detectives from the Liaison Unit went to White Plains to investigate, but it was not until January 30, 1996 that Chief Kelleher of IAB was informed of the allegations

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[1] The NYPD's Liaison Unit is designed to facilitate communications with other jurisdictions around the state where NYPD officers may live or engage in misconduct. It apparently works closely with the NYPD's Internal Affairs Bureau (IAB), although ADA Burmeister testified it was a separate unit.

concerning Officer Melino. On that date, Kelleher was in the midst of a regular meeting with ADA Burmeister regarding numerous official corruption matters when Melino's name fortuitously came up. Kelleher informed ADA Burmeister that he had received the drug dealing allegations against Melino earlier that day. On February 1, 1996, the date Melino was testifying in the trial of this case, ADA Burmeister and Chief Investigator Rosenzsweig set up a meeting for February 5, 1996, the following Monday, with the Liaison Unit detectives and others to discuss the matter.

At the February 5th meeting, the Liaison Unit detectives revealed that in 1991-1992 Melino was under investigation for selling a kilogram of cocaine to an undercover officer. ADA Burmeister was "very skeptical" of the allegations, since he found it extremely surprising that such serious accusations had not resulted in an arrest or otherwise been pursued for many years. Accordingly, in order to determine whether the charges had any substance, Burmeister decided to review the State Troopers' case file on Melino, and requested an interview with the undercover officer who allegedly purchased drugs from him. On February 6th, the date of the jury's verdict in this case, Burmeister received part of the Melino file and interviewed the undercover officer. Between February 6-8, Burmeister listened to the eight audiotapes purportedly revealing Melino's involvement in the drug sale. On February 8, Burmeister determined that the charges were substantiated and ordered Melino's arrest. Burmeister testified that he was unaware that Melino was testifying in this or any other cases, that he was not sure where Melino was presently assigned and that it is difficult to determine where an officer is testifying unless he is the arresting officer in a case. Defense counsel was

informed of Melino's arrest by letter dated February 15, 1996, giving rise to defendant's CPL 330.30 motion.

In denying defendant's motion, the trial court found that the prosecution's Brady obligation was not triggered until February 8, 1996, when ADA Burmeister determined that the allegations were substantiated and Melino's arrest ordered. The court further concluded that the nondisclosure was, in any event, harmless since Melino's testimony was "largely collateral" to the issues in the trial, especially in light of the four identifying witnesses and defendant's admissions. Given the collateral nature of Melino's testimony, the court determined that there was no reasonable probability that had the information concerning Melino been disclosed the result of the proceeding would have been different.

We affirm the denial of defendant's CPL 330.30 motion. It is beyond dispute that "[a] prosecutor's duty of disclosing exculpatory material extends to disclosure of evidence impeaching the credibility of a prosecution witness whose testimony may be determinative of guilt or innocence (People v Fein, 18 NY2d 162, cert denied 385 US 649; see, Giglio v United States, 405 US 150, 154; see, People v Steadman, 82 NY2d 1, 7)." (People v Baxley, 84 NY2d 208, 213.) Conversely, where the impeachment information has no bearing on defendant's guilt or innocence, such as where the prosecution witness's misconduct is completely unrelated to the trial at which he is testifying and the witness's testimony is not crucial to the prosecution's case, its nondisclosure does not constitute a Brady violation (see, People v Martin, 240 AD2d 5; People v Vasquez, 214 AD2d 93, 101-102; People v Shakur, 169 Misc 2d 961).

As defendant's request for exculpatory material in the present case was non-specific, the standard of materiality is whether there was a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different (People v Chin, 67 NY2d 22, 33; People v Vasquez, supra). That standard was not met here. Contrary to defendant's contention, Melino's testimony was hardly "pivotal" in securing his conviction. Melino testified regarding his investigative efforts in attempting to re-contact witnesses in the unsolved Quintero homicide, and recanvassing of the area for additional witnesses. He and another officer were successful in locating two witnesses who observed the shooting and participated in interviewing them. He further testified that he had assisted in escorting two eyewitnesses to a lineup. This type of testimony concerning police investigative work is generally not the type that, if subject to impeachment, is material to a defendant's guilt or innocence (see, People v Shakur, 169 Misc 2d, supra, at 975 [testimony of officer, accused of unrelated misconduct, regarding sexual assault victim's physical appearance and statements was mostly cumulative and peripheral to the People's case]; cf., Kyles v Whitley, 514 US 419 [nondisclosure of informant's statements contributed to Brady violation since disclosure would have raised opportunities to attack the thoroughness and good faith of investigation]).

Defendant suggests that Melino's testimony was material to guilt or innocence because, given his role in interviewing witnesses and in escorting them to a lineup, he had the opportunity to improperly influence the witness's identification of defendant, a contested issue at trial. He claims that had the defense been aware of Melino's misconduct, his cross-examination strategy would have been different and the identifications substantially undermined.

This theory is based entirely on supposition. Defense counsel's cross-examination of Melino and the other officers at both the suppression hearing and trial concerning the lineup revealed no irregularities, and, significantly, Melino's testimony was corroborated in nearly every respect by other officers (see, People v Martin, supra; People v Vasquez, supra). There is not one iota of evidence that the identifications were the product of coercion or suggestion, or that Melino harbored some secret motive to influence four witnesses to falsely implicate the defendant. Absent some other indication that the identifications were unreliable, the hypothetical and remote possibility that they were influenced by a corrupt officer is too slender a reed upon which to grant a new trial.

Moreover, Melino's criminal background must be examined in light of the considerable evidence offered by the prosecution at trial. Four eyewitnesses identified defendant as the shooter at trial, and all gave mostly consistent descriptions to the police including the unique characteristic that the shooter had a "grayish" ponytail. Two members of the drug gang Yellow Top Crew, which was affiliated with Marte's Red Top Crew, testified pursuant to cooperation agreements, regarding Marte's plan to kill the deceased and defendant's subsequent boasting as to having shot the deceased. Convincing the jury that all four identifications were the product of Melino's improper influence, and that the remaining testimony implicating defendant in the murder was somehow unworthy of belief, would have been a daunting task for defense counsel, if not an impossible one. Thus, given the overwhelming evidence of defendant's commission of the murder, we conclude that there is no reasonable probability that had the jury heard of Melino's misconduct, which was unrelated to this case and

occurred before he was a police officer, the jury would have rejected the identification evidence and acquitted defendant (People v Vasquez, supra; People v Shakur, supra; cf., Kyles v Whitley, supra).

The witness Mejias's testimony regarding Marte's statements that defendant had been hired to kill the deceased was properly admitted under the coconspirator exception to the hearsay rule (see, People v Salko, 47 NY2d 230, 240; see also, People v Tran, 80 NY2d 170, 179-180). A prima facie case of conspiracy was established without resort to Marte's statements (see, People v Salko, supra; People v Alwadish, 67 NY2d 973, 974; People v Owusu, 234 AD2d 893, lv denied 89 NY2d 1039), and these statements were clearly in furtherance of a continuing conspiracy (see, People v Rivera, 192 AD2d 363, lv denied 82 NY2d 758). Even if the witness Rivera's similar testimony was improperly admitted, that testimony was cumulative, as well as harmless in light of the overwhelming evidence of guilt (People v Valle, 235 AD2d 352, lv denied 90 NY2d 865).

We have considered defendant's remaining contentions and find them to be without merit.

Milonas, J. P., Rosenberger, Williams and Mazzarelli, JJ.

(3)

No. 04-1540

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In The

Supreme Court of the United States

GAYLE HAPONIK, ACTING SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY,

Petitioner,

v.

PABLO FERNANDEZ,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

J.L. POTTENGER, JR.
Counsel of Record
BRETT DIGNAM
THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION
P.O. Box 209090
New Haven, CT 06520-9090
(203) 432-4800

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a federal court, when calculating tolling time under 28 U.S.C. § 2244(d)(2), should apply the federal prison mailbox rule to a *pro se* prisoner's "properly filed" application for state relief where state law has no filing deadline for such applications?

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COUNTERSTATEMENT OF THE CASE

On June 10, 1993, a man named Ramon Quintero was shot and killed in New York County. Immediately after the crime, several eyewitnesses described the shooter as being in his thirties or forties, with gray hair and a ponytail. Respondent Fernandez at that time was twenty years-old and had short-cropped black hair.

Nearly two years after the shooting, New York Police Officer Albert Melino received a tip that Fernandez may have been the one who shot Quintero. Officer Melino headed up an investigation into Fernandez and got two of the original eyewitnesses to identify Fernandez as the perpetrator despite the inconsistency with the descriptions they had given at the time of the crime. Officer Melino also discovered or debriefed the other key witnesses who claimed that Fernandez had committed the crime, and he testified at a pre-trial identification hearing and again at trial about the course of his investigation. Thus, contrary to the assertion of the Superintendent, *see* Pet. at 4,[1] Officer Melino's role in securing Fernandez's conviction was anything but "tangential." He played a significant role in obtaining virtually every piece of evidence against Fernandez, even though such evidence was contradicted by that obtained by other officers in the immediate aftermath of the crime.

On February 6, 1996, Fernandez was found guilty in New York state court of Second Degree Murder. Two days later (February 8, 1996), the New York County District Attorney's office ordered Officer Melino's arrest on charges

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[1] Citations to "Pet." refer to the Petition for a Writ of Certiorari filed by Superintendent Artuz.

of dealing cocaine. The investigation into Officer Melino's criminal activities had begun in 1991 or 1992, and the District Attorney's office had learned of the investigation no later than Tuesday, January 30, 1996, a full week before the verdict. But it was not until nine days after the verdict – February 15, 1996 – that the state told Fernandez of the investigation. On June 21, 1996, Fernandez was sentenced to an indeterminate prison term of 25 years to life.

On direct appeal, Fernandez argued that he was entitled to a new trial based on the state's failure to disclose Officer Melino's criminal activity. Fernandez also asserted several other grounds for reversal, including that the trial judge's exchanges with defense counsel were prejudicial and that the judge's reasonable doubt charge improperly shifted the burden of proof. The New York Appellate Division affirmed Fernandez's conviction on April 2, 1998. *People* v. *Fernandez*, 249 A.D.2d 3, 670 N.Y.S.2d 840 (N.Y. App. Div. 1998). The New York Court of Appeals denied leave to appeal on August 18, 1998. *People* v. *Fernandez*, 92 N.Y.2d 897, 702 N.E.2d 845, 680 N.Y.S.2d 60 (1998).

On September 15, 1999, Fernandez submitted to prison officials for mailing a state application for a writ of error *coram nobis*, in which he argued that he had received ineffective assistance of counsel on his appeal. The prison did not mail the application to the appellate division until nine days later, on September 24, 1999. The record is not clear as to whether the appellate division received the application on September 27 or on September 28, 1999, but the date of receipt was inconsequential at the time because New York places no deadline on the submission of *coram nobis* applications. It is undisputed

that Fernandez's application met all applicable New York rules governing filing and that the appellate division considered the *coram nobis* as having been properly filed. The application was denied on the merits on June 15, 2000. *People* v. *Fernandez*, 273 A.D.2d 950, 714 N.Y.S.2d 625 (N.Y. App. Div. 2000).

On August 14, 2000, Fernandez submitted to prison officials for mailing his federal petition for a writ of habeas corpus. The petition, which was marked as received by the district court's *pro se* office on August 16, 2000, raised several habeas grounds that had been exhausted at the state level, including a *Brady* violation, in that the government did not inform the defense of the criminal investigation into Officer Melino's dealing of cocaine; unconstitutional shifting of the burden of proof as a result of the reasonable doubt charge given by the trial judge; and ineffective assistance of appellate counsel.

The Superintendent moved to have Fernandez's federal habeas petition dismissed as time-barred under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The Superintendent argued that the court should consider Fernandez's *coram nobis* as having been filed on September 27, 1999 – the date the Superintendent alleged the appellate division received the application – and that as a result, Fernandez's federal habeas petition was filed ten days after the AEDPA's one-year statute of limitations had expired. Fernandez argued that the court should consider his *coram nobis* as having been filed on September 15, 1999, the date he gave it to prison officials, because in most circumstances federal courts presumptively apply the "prison mailbox rule" to the filings of *pro se* prisoners. Accordingly, the AEDPA's one-year statute of limitations should have tolled from

September 15, 1999 through June 15, 2000, the date the appellate division denied Fernandez's *coram nobis*. Fernandez thus filed his federal habeas petition two days before the expiration of the limitations period.

Magistrate Judge Peck issued a Report and Recommendation that interpreted this Court's decision in *Artuz* v. *Bennett*, 531 U.S. 4 (2000), as prohibiting federal courts from applying the prison mailbox rule if the state of conviction does not itself apply the rule. *Fernandez* v. *Artuz*, No. 00 Civ. 7601, 2001 WL 506889, at *4 (S.D.N.Y. May 15, 2001). Magistrate Peck concluded that although the New York Court of Appeals had never so ruled, it "appears" that the court would not apply the prison mailbox rule to the filing of a *coram nobis* application in the appellate division, and so Fernandez's federal habeas petition should be dismissed as time-barred. *Id.* at *4-5. Magistrate Peck recommended, however, that the court issue a certificate of appealability on the issue, because "neither the Second Circuit nor the New York Court of Appeals has addressed the applicability of the 'prisoner mailbox rule' to the filing date of state collateral attacks on a conviction and the effect on the AEDPA's limitations period." *Id.* at *5.

District Judge Wood rejected Magistrate Peck's recommendation to dismiss Fernandez's federal habeas petition as time-barred. *Fernandez* v. *Artuz*, 175 F. Supp. 2d 682, 687 (S.D.N.Y. 2001). Judge Wood reasoned that *Artuz* v. *Bennett* did not dictate deferring to state law on the question of whether the prison mailbox rule should apply to calculations of tolling time under the AEDPA. *Id.* at 685 n.2. Rather, she held that the mailbox rule applied to Fernandez's *coram nobis* because 1) federal courts consistently apply the mailbox rule to various filings by state

prisoners and the AEDPA gives no indication that the rule should not apply for the purpose of calculating tolling time; 2) the federal court's application of the mailbox rule affects only the federal proceedings and does not have any effect on state proceedings or on federal respect for state courts; 3) federal courts already apply the mailbox rule to federal habeas petitions, so applying the rule to state filings would bring a measure of uniformity to the process by which prisoners assert their federal rights; and 4) the interests of justice and administrative efficiency are furthered by application of the mailbox rule. *Id.* at 684-687.

The Superintendent appealed and the Second Circuit unanimously affirmed. *Fernandez* v. *Artuz*, 402 F.3d 111 (2d Cir. 2005). The Second Circuit reasoned that application of the mailbox rule to state filings for the purpose of calculating AEDPA tolling time "is consonant with AEDPA's goals of 'furthering the principles of comity, finality, and federalism.'" *Id.* at 115 n.3, *quoting Williams* v. *Taylor*, 529 U.S. 420, 436 (2000). Applying the mailbox rule, the court stated, "grants the full statute of limitations for *pro se* prisoners attempting to reach the courts" and "evinces no disrespect for the competence of state courts, their procedures, or the stability of state verdicts." *Id.* at 115 n.3. The Second Circuit also noted that its result was consistent with *Artuz* v. *Bennett* because Fernandez's *coram nobis* was "properly filed" under state law and procedure. *Id.* at 114, 116. The issue of timeliness never arose in the state's consideration of Fernandez's *coram nobis* because New York has no deadline for the filing of *coram nobis* applications. As a result, there "is no and can be no real conflict between state law and federal law" in applying the

mailbox rule to Fernandez's properly filed *coram nobis* when calculating AEDPA tolling time. *Id.* at 116.

REASONS FOR DENYING THE WRIT

I. THE SECOND CIRCUIT'S RULING WILL HAVE NO EFFECT ON NEW YORK STATE LAW OR PROCEDURE BECAUSE FERNANDEZ'S APPLICATION WAS PROPERLY FILED UNDER NEW YORK LAW AND THE RULING APPLIES ONLY TO THE FEDERAL PROCEEDINGS.

The Superintendent mischaracterizes both the meaning and effect of the Second Circuit's opinion in asserting that the ruling will be "unfair" to New York appellate courts. *See* Pet. at 18-19. Importantly, the Second Circuit did *not* hold that the mailbox rule can be used to overcome a state court's prior determination of untimeliness or improper filing. There was and is no dispute that Fernandez's *coram nobis* application was "properly filed" under the terms of 28 U.S.C. § 2244(d)(2) and in accordance with *Artuz* v. *Bennett*, 531 U.S. at 8; its delivery and acceptance were in compliance with all New York laws and rules governing filing, and it was treated by the New York appellate division as having been properly filed. In fact, New York has no deadline for the filing of *coram nobis* applications. *See People* v. *Langfelt*, 21 A.D.2d 267, 249 N.Y.S.2d 949 (N.Y. App. Div. 1964) (requiring the lower court to consider a *coram nobis* application even though it was filed two years after the petitioner had been released from prison). The date of the application's filing was therefore irrelevant under New York law and procedure, and so the issue of timing never arose during Fernandez's state proceedings.

As a result, there can be no conflict between New York law and the Second Circuit's decision to apply the prison mailbox rule to Fernandez's properly filed *coram nobis* for the purpose of calculating AEDPA tolling time because New York state courts will never be faced with the question of whether the mailbox rule should apply to such applications. *See Fernandez*, 402 F.3d at 116.

The Superintendent suggests, however, that in other kinds of cases in which a filing deadline does exist, the Second Circuit ruling will create "chaos" by requiring federal courts to treat untimely petitions as having been "properly filed." *See* Pet. at 19. This is simply untrue. The Second Circuit opinion is carefully crafted to apply only to cases in which it is clear that a prisoner's state post-conviction application was properly filed under state law. *See Fernandez*, 402 F.3d at 114. Thus if a prisoner filed an untimely collateral attack under New York Criminal Procedure Law section 440.10, the Second Circuit's ruling could *not* be used to overcome the state court's determination of untimeliness. *Cf.* Pet. at 19.

Moreover, because a federal court can apply the prison mailbox rule only after state proceedings have been completed, the decision to apply the rule does not and cannot have any impact on New York procedure or New York's ability to establish its own filing rules. *See Fernandez*, 402 F.3d at 115 n.3 ("the mailbox rule's application solely for the purpose of calculating a federal statute of limitations has no bearing on New York's own *coram nobis* proceedings or the substance of its adjudication of a properly filed application under state law"). The Second Circuit's ruling affects only the federal court's application of federal law, and New York courts remain free to decide on their own whether to apply the prison mailbox rule for

state purposes. Thus, the only real consequence of the Second Circuit's decision is that prisoners who have properly filed a post-conviction motion in New York will receive the benefit of the full year of the AEDPA statute of limitations, rather than being forced to file early to compensate for mailing or clerical delays. *See id.*

II. THE FACT THAT THUS FAR ONLY FOUR CIRCUITS HAVE ADDRESSED THE PRISON MAILBOX ISSUE, UNDER A VARIETY OF FACTUAL CIRCUMSTANCES AND DEPENDENT UPON IDIOSYNCRASIES IN STATE PROCEDURAL RULES, COUNSELS AGAINST REVIEW UNTIL A CLEAR PATTERN OF DECISIONS EMERGES.

Contrary to the assertions of the Superintendent (*see* Pet. at 11), this case has nothing to do with procedural default, and the Second Circuit's ruling does not address the question of whether a state court's failure to use the mailbox rule constitutes cause to excuse procedural default. As discussed above, Fernandez's *coram nobis* met all of the requirements for proper filing at the state level, and the Second Circuit's holding is limited to cases involving properly filed state applications. The Superintendent's extended discussion of cases involving procedural default (*see* Pet. at 11, 14-15) is therefore beside the point.

Rather, the issue in this case – whether, when calculating the amount of time tolled under the AEDPA, a federal court can apply the prison mailbox rule to a properly filed state application – has been addressed only by the Second, Fifth, Ninth and Tenth Circuits.

The Ninth Circuit, like the Second, has held that once it is clear that a state application has been "properly filed," courts are to apply the federal mailbox rule for the purpose of calculating AEDPA tolling time. *See Anthony* v. *Cambra*, 236 F.3d 568, 575 (9th Cir. 2000), *cert. denied*, 533 U.S. 941 (2001); *Saffold* v. *Newland*, 224 F.3d 1087, 1091 (9th Cir. 2000), *amended by* 250 F.3d 1262, 1268 (9th Cir. 2000), *overruled on other grounds*, *Carey* v. *Saffold*, 536 U.S. 214 (2002). In *Anthony*, the Ninth Circuit was faced with a state petition that had been properly filed under California law but that the California Supreme Court had marked as filed upon receipt, not mailing. *See Anthony*, 236 F.3d at 571, 575. As in Fernandez's case, the date of filing made no difference to the outcome of the state case, but was determinative of whether the federal habeas petition was time-barred. *Id.* The Superintendent claims that the Ninth Circuit, in holding that the prison mailbox rule should be applied to the prisoner's state petition for the purpose of calculating AEDPA tolling time, suggested that the mailbox rule was constitutionally required. *See* Pet. at 13-14. But that is plainly untrue. The Ninth Circuit based its holding on the fact that federal courts already apply the prison mailbox rule to the filing of federal habeas petitions, and that the principles underlying the mailbox rule apply "with equal force to the filing of state as well as federal petitions, because '[a]t both times, the conditions that led to the adoption of the mailbox rule are present; the prisoner is powerless and unable to control the time of delivery of documents to the court.'" *Anthony*, 236 F.3d at 575, *quoting Saffold*, 224 F.3d at 1091.[2]

[2] The Superintendent is also wrong to suggest that the Ninth Circuit relied on the fact that California courts apply the mailbox rule

(Continued on following page)

In *Coleman* v. *Johnson*, the Fifth Circuit was faced with a *pro se* petitioner who presented evidence that he mailed his state post-conviction motion six weeks before the court stamped it as "filed." 184 F.3d 398, 400 (5th Cir. 1999) (*per curiam*), *cert. denied*, 529 U.S. 1057 (2000). The result of the delay, which appeared to be due to a filing error by the state clerk, was that if the federal court did not apply the mailbox rule to the state motion, the petitioner's federal habeas petition would be time-barred. *See id.* at 402. Complicating matters was the fact that it was not clear whether the mailbox rule would apply under Texas law. The petitioner pointed to Tex. R. Civ. P. 5, which provides that filing commences upon mailing, while respondent suggested that post-conviction proceedings were controlled by Tex. R. Crim. P. art 11.07, which governs habeas proceedings and makes no mention of the timing of filing, no doubt because Texas places no deadline on the filing of state habeas petitions. *See id.* at 400, 402 n.1; Tex. R. Civ. P. 5 ("A legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing"); Tex. R. Crim. P. art. 11.07 (requiring only that an application for a writ of habeas corpus be filed "after final conviction in a felony case").[3] In a *per*

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as a matter of state law (*see* Pet. at 14), because, as noted above, in *Anthony*, the California Supreme Court had not applied the mailbox rule. *See Anthony*, 236 F.3d at 575.

[3] The Superintendent argues that *Kinnard* v *Carnahan*, 25 S.W.3d 266 (Tex. App. 2000) stands for the proposition that Texas state courts do not apply the mailbox rule. *See* Pet. at 13. But *Kinnard*, which was decided after *Coleman*, held that Texas does recognize a mailbox rule, but only if the papers were deposited in a United States Postal Service receptacle and stamped with a legible postmark. *See Kinnard*, 25 S.W.3d at 269. Notably, in *Coleman*, the petitioner's filing did bear the required legible postmark and so the mailbox rule ostensibly should have been applied. *See Coleman*, 184 F.3d at 400, 402.

curiam ruling, the Fifth Circuit concluded, as have the Second and Ninth Circuits, that federal law should govern a federal court's application of the AEDPA statute of limitations, reasoning that looking to state law "would require us to interpret state rules of filing and to address the filing systems of state courts." *Coleman*, 184 F.3d at 402. But rather than applying the federal prison mailbox rule, which has become the presumptive rule for the vast majority of filings by *pro se* prisoners in federal courts (*see* Part III, *infra*), the Fifth Circuit held that it instead would itself examine the facts of the case itself to see if the prisoner merited equitable tolling. *See Coleman*, 184 F.3d at 402.

The Tenth Circuit, in *Adams* v. *Lemaster*, took a contrary approach, holding that principles of comity *required* that the court defer to New Mexico law in determining whether to apply the mailbox rule to a state application when calculating AEDPA tolling time. 223 F.3d 1177, 1181 (10th Cir. 2000). But New Mexico had no filing deadline for the state habeas petition at issue and, not surprisingly in view of this absence of a deadline, no state law or cases addressed whether New Mexico courts would apply the mailbox rule to state habeas petitions. *See id.* at 1181 n.3, 1182. So the *Adams* court engaged in a tortuous attempt to "predict" whether the New Mexico Supreme Court would apply the mailbox rule to state habeas petitions – despite the fact that the issue would never arise in New Mexico courts given the absence of a filing deadline. *See id.* at 1182-83. The Tenth Circuit concluded that the New Mexico Supreme Court "at the very least" would require receipt by the clerk before a petition would be

treated as having been filed, but left open the question of whether actual filing by the clerk was necessary. *See id.*[4]

Beyond this handful of cases, however, the question presented here has not been addressed by any other circuit, making the issue far from ripe for Supreme Court review. The remaining cases cited by the Superintendent are inapposite or irrelevant. In *Vroman* v. *Brigano*, the prisoner's state petition had never been properly filed and was therefore never under consideration by any state court. 346 F.3d 598, 603-604 (6th Cir. 2003). *Vroman* therefore stands for the uncontroversial position that the prison mailbox rule cannot be used to overcome a state court's prior determination that a post-conviction motion had been untimely filed. *See id.* ("this court will not reconsider the Ohio state courts' determination that Vroman's post-conviction petition was untimely").

The issue in *Maples* v. *Stegall*, *Davies* v. *McCaughtry*, *Luby* v. *Brady* and *Insyxiengmay* v. *Morgan* was not whether the mailbox rule applies for the purpose of calculating AEDPA tolling time, but rather whether the mailbox rule can be used to excuse procedural default at the state level – an issue not raised by this case. *See Maples*, 340 F.3d 433, 439 (6th Cir. 2003) (applying the mailbox rule to excuse a prisoner's state procedural default); *Insyxiengmay*, 403 F.3d 657, 667 (9th Cir. 2005) (same); *Davies*, No.

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[4] In a later case dealing with Oklahoma filing law, the Tenth Circuit chose not to discern on its own what the state's law would be in regard to the mailbox rule, and instead, because Oklahoma had a procedure for responding to certified questions, certified to the Oklahoma Court of Criminal Appeals the question of whether the prison mailbox rule applies in Oklahoma post-conviction proceedings. *See Moore* v. *Gibson*, 250 F.3d 1295, 1296, 1298 (10th Cir.), *cert. denied*, 534 U.S. 1000 (2001).

99-3460, 2000 U.S. App. LEXIS 7257 (7th Cir. Apr. 14, 2000) (unpublished), *cert. denied*, 531 U.S. 962 (2000) (declining to use the mailbox rule to excuse state court determination of petitioner's state procedural default); *Luby*, No. 95-26-SLR, 1996 U.S. Dist. LEXIS 8157, at *3 (D. Del. May 16, 1996) (unpublished) (same).

And in *Brown* v. *Shannon*, *Koerner* v. *Grigas* and *Kestler* v. *Cockrell*, the filing dates of the prisoners' state petitions had no bearing on the cases' outcomes. *See Brown*, 322 F.3d 768, 771 n.3 (3d Cir. 2003) (suggesting the mailbox rule would apply to a state filing, but noting that the question was irrelevant because the prisoner's federal habeas was untimely regardless of the mailbox rule); *Koerner*, 328 F.3d 1039, 1044 n.1, 1053 (9th Cir. 2003) (petitioner's claim not procedurally barred even though mailbox rule not applied); *Kestler*, No. 02-41189, 73 Fed. Appx. 690, 691 (5th Cir. Aug. 20, 2003) (*per curiam*) (unpublished) (petitioner's federal habeas untimely even if mailbox rule were applied).

III. THE SECOND CIRCUIT OPINION IS CONSISTENT WITH THIS COURT'S AEDPA JURISPRUDENCE IN THAT IT FOLLOWS *HOUSTON* V. *LACK* AND DOES NOT CONFLICT WITH *ARTUZ* V. *BENNETT* OR *PACE* V. *DIGUGLIELMO*.

The Second Circuit's holding follows the principles this Court laid out in *Houston* v. *Lack*, 487 U.S. 266 (1988) and, contrary to the assertions of the Superintendent (*see* Pet. at 16), is in accordance with this Court's decisions interpreting 28 U.S.C. § 2244(d)(2). In *Houston*, this Court held that *pro se* prisoners' notices of appeal are considered to be "filed" at the moment of delivery to prison officials for

forwarding to the court. *See Houston*, 487 U.S. at 270. Central to the Court's reasoning was the imperative to treat fairly *pro se* prisoners, who, unlike other litigants, "cannot personally travel to the courthouse to see that the notice is stamped 'filed' or to establish the date on which the court received the notice." *Id.* at 271. Following *Houston*, federal courts in every circuit have applied the mailbox rule to nearly all filings of *pro se* prisoners, including the filing of Section 1983 complaints (*see, e.g., Cooper* v. *Brookshire*, 70 F.3d 377, 381 (5th Cir. 1995)); FTCA claims (*see, e.g., Garvey* v. *Vaughn*, 993 F.2d 776, 783 (11th Cir. 1993)); administrative complaints (*see, e.g., Longenette* v. *Krusing*, 322 F.3d 758, 765 (3d Cir. 2003)); service of discovery responses (*see, e.g., Faile* v. *Upjohn Co.*, 988 F.2d 985, 988-89 (9th Cir. 1993)); Rule 59(e) motions to amend judgment (*see, e.g., Edwards* v. *United States*, 266 F.3d 756, 758 (7th Cir. 2001) (*per curiam*)); and federal habeas petitions (*see, e.g., Marsh* v. *Soares*, 223 F.3d 1217, 1218 n.1 (10th Cir. 2000)). *See generally, Sulik* v. *Taney County, Mo.*, 316 F.3d 813, 815 (8th Cir. 2003) (noting that all federal circuits to consider the issue have extended the prison mailbox rule to civil complaints); *see also infra*, p. 17. *But see Guirguis* v. *INS*, 993 F.2d 508, 510 (5th Cir. 1993) (declining to apply the mailbox rule to BIA appeals because the applicable regulation required papers to be received by the clerk within the time fixed for filing). The Second Circuit's application of the mailbox rule to Fernandez's *coram nobis* is therefore in accordance with well-established doctrine providing that unless a statutory scheme explicitly demands otherwise, when federal interests are at stake, federal courts apply the mailbox rule.

The Second Circuit opinion also furthers the interests of comity and federalism central to this Court's habeas

jurisprudence by allowing state proceedings to take their course without interference by federal courts. *See Coleman* v. *Thompson*, 501 U.S. 722, 731 (1991) ("in a federal system, the States should have the first opportunity to address and correct alleged violations of [a] state prisoner's federal rights"); *Duncan* v. *Walker*, 533 U.S. 167, 179 (2001) ("The tolling provision of § 2244(d)(2) balances the interests served by the exhaustion requirement and the limitation period"). Applying the mailbox rule to properly filed applications for the purpose of calculating AEDPA tolling time ensures that prisoners are not penalized for attempting to exhaust their claims in state court before filing in federal court. If the mailbox rule were not applied to state applications, prisoners approaching the AEDPA's one-year deadline would be forced to file their federal habeas petitions while their state applications are still pending, because while the mailbox rule gives prisoners control over the filing dates of their federal petitions, prisoners lack such control over when state courts choose to consider their state applications as having been filed.

Furthermore, the Superintendent's suggestion that the Second Circuit ruling conflicts with this Court's holdings in *Artuz* v. *Bennett* and *Pace* v. *DiGuglielmo*, 125 S.Ct. 1807 (2005) (*see* Pet. at 16) is plainly incorrect. *Artuz* v. *Bennett* explained that an application is "properly filed" under 28 U.S.C. § 2244(d)(2) so long as its "delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz*, 531 U.S. at 8. Far from "ignoring" these requirements (*see* Pet. at 17), the Second Circuit carefully observed that Fernandez's *coram nobis* application, which was timely filed and was in compliance with all other New York laws and rules governing filings, fit *Artuz* v. *Bennett*'s criteria for proper filing and therefore

appropriately tolled the AEDPA's statute of limitations. *See Fernandez*, 402 F.3d at 115.

Artuz v. *Bennett*, in dicta, also defined the term "filed" as "when [the application] is delivered to, and accepted by, the appropriate court officer." *Artuz*, 531 U.S. at 8. The Superintendent argues that this definition should control whether courts apply the mailbox rule when calculating the length of the pendency of a properly filed application because "the common meaning of the term 'filed' . . . remains consistent regardless of its context." Pet. at 17. But if "filed" means delivery to and acceptance by a court officer, the prison mailbox rule could never be applied, no matter what the circumstance, because the mailbox rule requires reading the term "filed" not as delivery to the court but as "delivery to prison authorities." *See Houston*, 487 U.S. at 275. Overruling *Houston sub silentio* could not have been the intent of *Artuz* v. *Bennett*, which read 28 U.S.C. § 2244(d)(2) in a way meant to be favorable to *pro se* habeas petitioners by allowing some applications that had been procedurally barred under state law to nonetheless toll the AEDPA's statute of limitations. *See Artuz*, 531 U.S. at 11.

The Second Circuit's ruling is also in accordance with *Pace*, which involved a prisoner whose state post-conviction petition had been rejected by the state court as untimely. *See Pace*, 125 S.Ct. at 1811. *Pace* held that state time limits constitute conditions to proper filing, and thus the petitioner's untimely filing could not toll the AEDPA's statute of limitations. *See id.* at 1814. Here, Fernandez's *coram nobis* was timely filed, meeting *Pace*'s requirements for proper filing. Moreover, underlying *Pace* was the desire to prevent prisoners from being able to "toll the [AEDPA] statute of limitations at will simply by filing untimely

state postconviction petitions." *Id.* at 1812. But because the Second Circuit's opinion applies only to applications that have been properly filed under state law, no possibility of such "abusive delay" (*see id.*) exists.

Nor is it anomalous for the Second Circuit to apply state law when determining whether an application has been properly filed, while using federal law to calculate the length of the pendency of the application. *Cf.* Pet. at 17. In Section 1983 cases filed by *pro se* prisoners, for example, federal courts look to state law to determine the length of the applicable statute of limitations, but then use the federal prison mailbox rule to determine the actual date of filing. *See, e.g., Casanova* v. *Dubois*, 304 F.3d 75, 78 n.4, 79 (1st Cir. 2002) (borrowing Massachusetts' three-year statute of limitations for personal injury actions in determining length of limitations period for prisoners' Section 1983 claims, but applying federal prison mailbox rule to determine date of filing); *Lewis* v. *Richmond City Police Dept.*, 947 F.2d 733, 736 (4th Cir. 1991) (borrowing Virginia's two-year statute of limitations for personal injury actions, but applying federal prison mailbox rule to determine date of filing). *See also Richard* v. *Ray*, 290 F.3d 810, 813 (6th Cir. 2002) (in a diversity case, applying Kentucky's one-year statute of limitations for medical malpractice claims but applying the federal prison mailbox rule to determine date of filing).

In addition, any time a court applies the prison mailbox rule – regardless of the circumstance – the court must separate the question of *whether* papers are filed from *when* they are filed, because the mailbox rule can only be applied in cases in which the prisoner's filings actually reach the court, no matter when they were given to prison officials. *See Houston*, 487 U.S. at 273 ("delivery of a notice

of appeal to prison authorities would not under any theory constitute a 'filing' unless the notice were delivered for forwarding to the district court"). Thus, in order to apply the mailbox rule, courts must always make a two-step inquiry: first, into whether the papers were ever properly filed; and second, into when the papers should be considered as having been filed. *See id.* (distinguishing between "timing" and "destination"). In this case, following this Court's jurisprudence, the first question is determined by reference to state law and the second requires application of *Houston*'s federal mailbox rule.

CONCLUSION

For the reasons given above, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

J.L. POTTENGER, JR.
Counsel of Record
BRETT DIGNAM
THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION
P.O. Box 209090
New Haven, CT 06520-9090
(203) 432-4800